No. 91-8685-CFY Title: Terry Lynn Stinson, Petitioner
Status: GRANTED v.
United States

Docketed: Court: United States Court of Appeals for
June 18, 1992 the Eleventh Circuit

Counsel for petitioner: Kent,William Mallory

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 18 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jul 16 1992		Order extending time to file response to petition until August 21, 1992.
5	Aug 20 1992		Brief of respondent United States in opposition filed.
6	Aug 27 1992		DISTRIBUTED. September 28, 1992
7	Sep 3 1992	X	Supplemental brief of petitioner filed.
8	Sep 22 1992	X	Supplemental brief of respondent United States filed.
10	Oct 5 1992		REDISTRIBUTED. October 9, 1992
11	Oct 8 1992	X	Reply brief of petitioner filed.
13	Oct 13 1992		REDISTRIBUTED. October 16, 1992
15	Oct 26 1992		REDISTRIBUTED. October 30, 1992
17	Nov 2 1992		REDISTRIBUTED. November 6, 1992
19	Nov 9 1992		Petition GRANTED. limited to the following question: "Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under USSG Section 4B1.1, see USSG Section 4B1.2 comment. (n.2), constitutes an 'incorrect application of the sentencing guidelines' under 18 U.S.C. Section 3742(f)(1)."
			**********
21	Nov 23 1992		Order extending time to file brief of petitioner on the merits until January 6, 1993.
22	Jan 6 1993		Joint appendix filed.
23	Jan 6 1993		Brief of petitioner Terry Lynn Stinson filed.
28	Jan 6 1993		Brief amicus curiae of Florida Association of Criminal Defense Lawyers filed.
25	Feb 11 1993		Brief of respondent United States filed.
26	Feb 12 1993		CIRCULATED.
27	Feb 12 1993		Record filed.
		*	Certified proceedings U.S. Court of Appeals and U.S.District Court (One Sealed Envelope).
24	Mar 3 1993		SET FOR ARGUMENT WEDNESDAY, MARCH 24, 1993. (2ND CASE).
29	Mar 24 1993		ARGUED.

NO. 91-5961

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TERRY LYNN STINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether possession of a firearm by a felon is a "crime of violence," as that term is used in the Career Offender provisions of the Federal Sentencing Guidelines, §§4B1.1 and 4B1.2?

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TERRY LYNN STINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, **TERRY LYNN STINSON**, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on March 20, 1992 and October 4, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit denying the petition for rehearing is reported at 957 F.2d 813, and the opinion of the Court of Appeals for the Eleventh Circuit affirming petitioner's sentence is reported at 943 F.2d 1268. Both opinions are set forth in the appendix hereto.

JURISDICTION

The petitioner, **TERRY LYNN STINSON**, was prosecuted by indictment in the United States District Court, for the Middle District of Florida, for violation of Title 18 U.S.C. §2113(a) and (d), Title 18 U.S.C. §922(g), §924(a)(2) and §924(e), Title 18 U.S.C. §924(c), Title 26 U.S.C. §5861(d) and §5871, and Title 18 U.S.C. §2312. Stinson pled guilty to all charges and was sentenced on July 6, 1990.

Stinson appealed his sentence to the Eleventh Circuit Court of Appeals invoking the Court's jurisdiction under Title 18 U.S.C. §3742(a)(2) and (3) as well as Title 28 U.S.C. §1291. Stinson's sentence was affirmed by the Eleventh Circuit Court of Appeals in an opinion rendered on October 4, 1991. Stinson's petition for rehearing was denied in an opinion entered on March 20, 1992.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under Title 28 U.S.C. §1254(1).

SENTENCING GUIDELINE PROVISION INVOLVED

§4B1.1. **Career Offender**

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise

applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum		Offense Level*
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than 1 year, but less than 5 years	12

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by 2 levels.

STATEMENT OF THE CASE

(A) **Course of Proceedings and Dispositions in the Courts Below.**

On January 10, 1990, a five count indictment was filed by a Middle District of Florida Grand Jury charging Terry Lynn Stinson, the Petitioner herein, with armed bank robbery, various firearm violations, including, possession of a firearm by a felon (subject to the armed career criminal provision), and interstate transportation of a stolen motor vehicle. Count One charged Mr. Stinson with bank robbery on October 31, 1989, at Jacksonville, Florida, in violation of Title 18 U.S.C. §2113(a) and (d). Count Two charged that on October 31, 1989, having been previously convicted of a felony offense, Mr. Stinson possessed a firearm, in violation of Title 18 U.S.C. §922(g), §924(a)(2), and §924(e) (Armed Career Criminal Act). Count Three charged that on October 31, 1989, Mr. Stinson did knowingly use and carry a sawed-off shotgun during, and in relation to, a crime of violence, that is, bank robbery, in violation of Title 18 U.S.C. §924(c). Count Four charged that on October 31, 1989, Mr. Stinson possessed a sawed-off shotgun which was not registered to him in the National Firearms Registration and Transfer Record, in violation of Title 26 U.S.C. §5861(d), and §5871. Count Five charged that on or about October 31, 1989, to on or about November 3, 1989, Mr. Stinson transported in interstate commerce, a stolen 1985 Ford van from Jacksonville, Florida,

to Gulfport, Mississippi, in violation of Title 18 U.S.C. §2312. The Federal Public Defender for the Middle District of Florida was appointed to represent Mr. Stinson on January 29, 1990 and William Mallory Kent, Assistant Federal Public Defender filed an appearance on behalf of Mr. Stinson.

On April 11, 1990, Mr. Stinson entered a plea of guilty to Counts One through Five. Mr. Stinson was sentenced by the Honorable Susan H. Black, then Chief Judge of the Middle District of Florida, on July 6, 1990 to 365 months imprisonment as to Counts 1, 2, 4 and 5 and to five (5) years as to Count 3, to run consecutive to the sentence on Counts 1, 2, 4 and 5.[1]

A notice of appeal was timely filed on July 13, 1990, whereupon an appeal to the Eleventh Circuit followed. In an opinion authored by Circuit Judge Edmondson, for a three judge panel, Mr. Stinson's sentence was affirmed on October 4, 1991. Mr. Stinson's petition for rehearing was denied in a per curiam opinion on March 20, 1992 and his petition for rehearing en banc was denied by memorandum order thereafter. This petition followed in a timely fashion.

(B) **Statement of Facts**

On October 31, 1989, at approximately 12:00 p.m., the Petitioner, Terry Lynn Stinson, entered Sun Bank located at

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[1]Judge Black's nomination to the Court of Appeals for the Eleventh Circuit was approved by the United States Senate the week of the filing of this petition.

344 Monument Road, Jacksonville, Florida and approached one of the customer service employees. He demanded money from the bank employee and stated that if she did not comply he would throw what appeared to be a hand grenade in her lap. The customer service employee then escorted him to one of the teller windows where she instructed the teller to give him the money. The teller took the money out of the cash drawer and placed it on the counter. Mr. Stinson then handed the employee a plastic bag and told her to put the money in it. During the confrontation, Mr. Stinson displayed a sawed-off shotgun and also pointed it at the customer service representative's face.

Mr. Stinson stated to the employees that he did not want any dye packs or bait money and also stated that he wanted the money from the drive through cash drawers. A dye pack was placed in Mr. Stinson's bag, but it failed to activate.

After obtaining the money, Mr. Stinson ordered everyone in the bank to lie down. As he was leaving the bank, he threw the hand grenade that he had in his hand onto the floor. He fled the bank, traveling in a white Chevrolet pick-up truck. A total of $9,427.00 in United States currency was taken in the robbery.

Subsequent investigation determined that the hand grenade used by Mr. Stinson was not armed. During the robbery, Mr. Stinson had in his possession a portable, hand held police scanner. Mr. Stinson's get-away vehicle was located by the

police at 355 Monument Road in the Regency Lake Apartment Complex. Located in the back of the truck was an explosive device, constructed from PVC pipe, concrete, stereo speaker wires and other components. The area was evacuated and the Navy Explosive Ordinance Demolition Team was called to the scene and subsequently rendered the device harmless. The sawed-off section of the barrel of the shotgun used by Mr. Stinson in the bank robbery was also found in the back of the truck.

Subsequent to the bank robbery, it was reported to the Jacksonville Sheriff's Office that Mr. Stinson had accompanied a car salesman for Mike Davidson Ford on a test drive of a 1985 Ford van. During the test drive, Mr. Stinson took the car salesman, by gun point, to Woodcreek Apartments, 401 Monument Road, where Mr. Stinson resided. While in the apartment, Mr. Stinson restrained the car salesman with a pair of handcuffs and rope. Additionally, he told the salesman, Mr. Dorminey, that he had rigged a bomb in the apartment, which would go off if Mr. Dorminey left the closet where he was confined. Mr. Stinson then left his apartment driving the white pick-up truck and proceeded to Sun Bank where the robbery was committed. After the robbery, the defendant then returned for the Ford van, leaving the pick-up truck behind.

It was later reported by the car salesman that Mr. Stinson displayed a Florida identification at the car dealership, which reflected his true identity.

After the robbery, Mr. Stinson left Jacksonville, Florida traveling in the stolen Ford van. He traveled to Walt Disney World, in Orlando, Florida for a brief vacation on the day of the robbery. The following day, he traveled to Gulfport, Mississippi, where he was arrested on November 3, 1989. The Chevrolet pick-up truck which was used during the bank robbery was stolen from Cox Pools, Tallahassee, Florida, Mr. Stinson's former employer. The vehicle was reported stolen on October 6, 1989.

The Pre-Sentence Investigation Report determined that Mr. Stinson was a career offender pursuant to Sentencing Guidelines §4B1.1, choosing among his five counts of conviction as the "instant offense conviction" the charge of possession of a firearm by a convicted felon, the penalty for which was enhanced under the armed career criminal provisions of Title 18 U.S.C. §924(e) to life in prison, concluding that the charge of possession of a firearm by a felon was a crime of violence. Based on the career offender provision, with the predicate offense having a maximum penalty of life in prison, the base offense level was 37 and criminal history category was VI, with a guideline range of 360 months to life in prison.

At the sentencing hearing, counsel for Mr. Stinson repeated the objection previously made to the United States Probation Office that possession of a firearm by a felon, if the offense was committed prior to November 1, 1989, was not

a "crime of violence" under Guideline Section 4B1.1 [which defines the term by incorporating the definition of "crime of violence" under Title 18, U.S.C. §16], and cannot be the predicate offense to trigger the career offender provisions of Guideline Section 4B1.1.

The District Court ruled against Mr. Stinson as to his of objection. The District Court then determined the base offense level to be 37, reduced that level two levels for "acceptance of responsibility" for a total offense level of 35, category VI, and a sentencing range of 292-365 months. The District Court sentenced Mr. Stinson to 365 months, plus a minimum mandatory consecutive five (5) years for use of a firearm during the commission of a crime of violence (Title 18 U.S.C. §924(c)). That sentence was affirmed by the Eleventh Circuit on October 4, 1991.

Subsequent to the issuance of the first Stinson opinion on October 4, 1991, the United States Sentencing Commission issued an amendment to the Commentary to Sentencing Guideline §4B1.2, specifically addressing the sole issue in this petition. That amendment, which became effective on November 1, 1991, clarified the pre-existing intent of the Sentencing Commission that the term "crime of violence" (as used in the career offender provision §4B1.1) does not include the offense of unlawful possession of a firearm by a felon. This clarifying amendment was the basis for a petition for rehearing and rehearing en banc. The Eleventh Circuit denied

the petition for rehearing in an opinion issued on March 20, 1992. Thereafter, the petition for rehearing en banc was denied, and this petition followed.

REASONS FOR GRANTING THE WRIT

Section 4B1.1 of the Sentencing Guidelines provides:

> "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense"

Stinson does not contest element (1), that he was over eighteen at the time of the offense, or (3), that he had been twice convicted of crimes of violence. Stinson argues that the offense used in his case as the predicate "instant offense of conviction," was not a "crime of violence." Stinson's conviction for possession of a firearm by a felon was chosen by the sentencing court as the predicate instant offense, holding over Stinson's objection, that possession of a firearm by a felon is a "crime of violence," as that term is defined in Section 4B1.2 of the Sentencing Guidelines.[2]

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[2]Because Stinson had three prior violent felonies, he was subject to a minimum mandatory fifteen years to life imprisonment for conviction on the possession of a firearm charge, under Title 18, §924(e)(Armed Career Criminal Act). Stinson agreed that he was a career offender, but only by using his armed bank robbery conviction (Title 18, §2113(a)(d)) as the predicate instant offense. The maximum penalty for armed bank robbery is twenty-five years. Under the career offender provision of the guidelines, the maximum penalty for the predicate instant offense determines the total offense level. The total offense level is thirty-seven for a life offense, but only thirty-four for an offense punishable by twenty-five years. What is ultimately at issue in Stinson's case is that three level difference, which at

Stinson's crime occurred on October 31, 1989 and he was sentenced on July 6, 1990. At the time of his offense §4B1.2 defined "crime of violence" to have the same meaning as the definition of crime of violence in Title 18, §16.

However, §4B1.2 was amended effective November 1, 1989, i.e., before Stinson's July 6, 1990 sentencing, to define crime of violence as follows:

> "(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that -
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> > (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[3] (emphasis supplied)

Category VI, is a difference in range from 360 months to life at level thirty-seven, to 262 to 327 at level thirty-four. Because Stinson received a two level downward adjustment for acceptance of responsibility, to level thirty-five, the difference in ranges is 292 to 365 for level thirty-five and 210 to 262 for level thirty-two.

[3]The definition applicable at the time of the offense (October 31, 1989) was that found at Title 18, §16, which reads:

> **§ 16. Crime of violence defined**
>
> The term "crime of violence" means-
>
> > (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (b) any other offense that is a felony and that, by its nature, involves a substantial risk

The amended definition was apparently borrowed from the definition of crime of violence used in the Armed Career Criminal Act, Title 18, §924(e). In the Application Notes in the Commentary to §4B1.2 effective November 1, 1989, the Sentencing Commission stated that courts may look to "conduct set forth in the count of which the defendant was convicted," in deciding whether the predicate instant offense "presented a serious potential risk of physical injury to another." (U.S.S.G. §4B1.2, comment. (n.2)). A later amendment effective November 1, 1991, clarified what "conduct" was the focus of the inquiry, by adding "the conduct set forth (i.e. expressly charged) in the count of which the defendant was convicted."

Relying on either the pre-November 1989 Title 18, §16 definition, or the later "borrowed" §924(e) definition of crime of violence, the Third, Seventh, Eighth, and Tenth circuits held that on the facts of the respective cases (impliedly, or expressly stating that the offense was not per se or categorically a crime of violence), that possession of a firearm by a felon was a crime of violence for career offender purposes. **United States v. Williams**, 892 F.2d 296

> that physical force against the person or property of another may be used in the course of committing the offense.

The Ex Post Facto concern raised by the Circuit court's application of the amended definition in effect at the time of sentencing will be addressed below.

(3rd Cir. 1989); **United States v. McNeal**, 900 F.2d 119 (7th Cir. 1990); **United States v. Alvarez**, 914 F.2d 915 (7th Cir. 1990); **United States v. Cornelius**, 931 F.2d 490 (8th Cir. 1991); **United States v. Walker**, 930 F.2d 789 (10th Cir. 1991).[4] In addition, the Fifth, Ninth and Eleventh Circuits each held that possession of a firearm by a felon was per se, or categorically, a crime of violence. **United States v. Goodman**, 914 F.2d 696 (5th Cir. 1990); **United States v. Shano**, 947 F.2d 1263 (5th Cir. 1991) (**Shano I**); **United States v. O'Neal**, 937 F.2d 1369 (9th Cir. 1990); **United States v. Stinson**, 943 F.2d 1268 (11th Cir. 1991) (**Stinson I**).[5]

Following the Eleventh Circuit's opinion in **Stinson I**, and without any advance public notice, the Sentencing Commission issued a clarifying amendment to Application Note 2 to the Commentary to the Career Offender provisions. The note was amended by adding the following language:

> "The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense..." (emphasis supplied).

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[4]The Seventh Circuit, establishing that possession of a firearm is not categorically a crime of violence also held, in **United States v. Chappel**, 942 F.2d 439 (7th Cir. 1991) that possession was not a crime of violence on the facts presented in that case.

[5]There was a debate within these opinions as to whether only the generic offense, or the offense conduct charged in the indictment or the actual underlying conduct could be examined to determine whether a crime of violence had occurred. The Circuits split on the effect of **Taylor v. United States**, ___ U.S. ___, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) on this sub-issue.

At the same time, but following public notice and submission to Congress, Guideline 2K2.1 was substantially revised to expressly provide an offense level 24 (and, in some cases, level 26) for a felon in possession who had two prior crimes of violence or serious drug offenses, and a Guideline was added (§4B1.4), to cover Armed Career Criminals, making an armed career criminal (a felon in possession with three prior crimes of violence or serious drug offenses), level 34 (or, in some cases, level 33). These amendments to the Guidelines were effective November 1, 1991, but the clarifying amendment to the existing commentary presumably clarified preexisting intent, that is, the intent at the time of Stinson's sentencing.

Based upon the clarification published by the Sentencing Commission that it did not intend a possession of a firearm offense to constitute a crime of violence for career offender purposes, Stinson petitioned for a rehearing and for rehearing en banc.

Stinson's petition for rehearing was denied in **United States v. Stinson**, 957 F.2d 813 (11th Cir. 1992)(**Stinson II**), and his petition for rehearing en banc was subsequently denied by a memorandum order. In **Stinson II**, the Eleventh Circuit

held that it was not bound by the change in Guideline Section 4B1.2's Commentary until Congress amends Guideline Section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a "crime of violence." For Stinson, this meant that the Eleventh Circuit stood by its original interpretation of Section 4B1.2 that possession of a firearm by a felon "inherently constitutes a crime of violence," and Stinson's sentence was affirmed and motion for rehearing denied.[6]

However, every other Circuit that has been called upon to reexamine the issue since the November 1, 1991 clarifying amendment has held contrary to the Eleventh Circuit, that possession of a firearm by a felon is not a crime of violence. **United States v. Doe**, ___ F.2d ___ (1st Cir. 1992); **United States v. Bell**, ___ F.2d ___ (1st Cir. 1992); **United States v. Johnson**, ___ F.2d ___ (4th Cir. 1992); **United States v. Poe**, __ F.2d ____ (4th Cir. 1992); **United States v Fitzhugh**, __ F.2d ___ (5th Cir. 1992); **United States v. Shano**, ___ F.2d ___ (5th Cir. 1992)(**Shano II**); **United States v. Sahakian**, ___ F.2d ___ (9th Cir. 1992).[7]

In **Sahakian**, the Ninth Circuit went from holding possession of a firearm is categorically a crime of violence

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[6]On May 14, 1992, in **United States v. Adkins**, ___ F.2d ___, 1992 U.S. App. Lexis 10421 (11th Cir. 1992), the Eleventh Circuit reaffirmed **Stinson I** and **Stinson II**.

[7]**But see**, **United States v. Alvarez**, ___ F.2d ___ (9th Cir. 1992), in which no issue was made of using a possession charge as a predicate for the career offender.

(in **O'Neal**) to hold instead that it categorically is not a crime of violence. Similarly, the Fifth Circuit, post amendment in **Fitzhugh**, has reversed, apparently, its prior holding in **Goodman**, and, in **Shano II** reversed its prior holding in **Shano I**. The First Circuit, in **Bell** and **Doe**, has now joined with the new position of the Ninth Circuit in **Sahakian**, that possession of a firearm by a felon is categorically never a crime of violence. The Fourth Circuit, in **Johnson**, appears to still leave open the possibility that possession of a firearm by a felon can be a crime of violence, if violence is set forth in the express language of the indictment, although holding that it was not a crime of violence on the facts of the particular case.

Where this leaves the issue is that only the Eleventh Circuit continues to hold, alone among all nine circuits that have considered the issue, in the face of Sentencing Commission commentary expressly and directly contradicting its position, that possession of a firearm by a felon is always and in every case, regardless of the conduct charged in the indictment or the actual underlying conduct, a crime of violence for purposes of the Career Offender provision.[8]

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[8]The Eleventh Circuit had held in **United States v. Cruz**, 805 F.2d 1464 (11th Cir. 1986) and in **United States v. Gonzalez-Lopez**, 911 F.2d 542 (11th Cir. 1986) that the 18 U.S.C. §16 definition had to be determined using a generic or categorical approach without looking at actual conduct. Stinson argued that application of the post October 31, 1989 amendments, to the extent they allowed for examination of actual offense conduct, would violate the Ex Post Facto provision of the Constitution.

The Eleventh Circuit did not discuss this Court's opinion in **Williams v. United States**, ___ U.S. ___, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992), in declining to be bound by Sentencing Guidelines commentary expressly prohibiting the position it took in interpreting Sentencing Guideline Section 4B1.2[9]

As the Eleventh Circuit noted, Guideline §1B1.7 states that "commentary is to be treated as the equivalent of a policy statement." In **Williams**, Justice O'Connor, writing for a seven justice majority, explained as follows:

> "Congress has defined "guidelines" as "the guidelines promulgated by the Commission pursuant to §994(a)." 28 U.S.C. §998(c). Section 994(a) grants the Commission the authority to promulgate both "guidelines," 28 U.S.C. §994(a)(1), and "general policy statements regarding application of the guidelines," §994(a)(2). The dissent draws a distinction between the "actual" guidelines and the policy statements that "interpret []" and "explain []" them; in the dissent's view, only the former can be incorrectly applied within the meaning of §3742(f)(1). Post, at 5-6. But to say that guidelines are distinct from policy statements is not to say that their meaning is unaffected by policy statements. Where, as here, a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline. An error in interpreting such a policy statement could lead to an incorrect determination that a departure was appropriate. In that event, the resulting sentence would be one that was "imposed as a result of an incorrect application of the sentencing guidelines" within the meaning of § 3742(f)(1)."

Applied to Stinson's case, the **Williams** approach to interpreting policy statements (and commentary) would appear to mandate a reversal of **Stinson II**, because in **Stinson II** the Eleventh Circuit has chosen to disregard a direct and express prohibition of the Sentencing Commission specifically excluding felons in possession from the definition of crimes of violence.[10]

Additionally, the Eleventh Circuit, in focusing on the one sentence amendment to note two to the Commentary to Guideline §4B1.2 (wherein it was expressly added that the crime of possession of a firearm by a felon was not a crime of violence), ignored the newly added cross-reference to the newly amended Guideline 2K2.1, and also ignored the addition effective November 1, 1990 of new Guideline Section 4B1.4 (Armed Career Criminal).

Before November 1, 1990, there was no guideline for an armed career criminal. Armed career criminals were sentenced outside the guidelines under the statutory mandate of a sentence of "not less than fifteen years." Title 18, §924(e). In counsel's experience, armed career criminals were not

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[9]The **Williams** opinion was issued after Stinson's petition for rehearing was filed and after the United States filed its response, but before the court issued it's opinion denying the petition for rehearing in **Stinson II**. Counsel for Stinson cited **Williams** to the Eleventh Circuit as supplemental authority under Rule 28(j), of the Federal Rules of Appellate Procedure, under cover of a letter dated April 20, 1992, in support of the still outstanding petition for rehearing en banc.

[10]Post **Stinson II** the United States Sentencing Commission has submitted to Congress among its 1991 amendments to the Guidelines its previously published change in the commentary at issue here, United States Sentencing Commission, 57 Fed. Reg. 20148, May 11, 1992.

sentenced under the Career Offender guidelines, although if one assumes that possession of a firearm by a felon is a crime of violence, then by definition most armed career criminals would also be career offenders.[11] Guideline 4B1.4 was expressly created for armed career criminals, effective November 1, 1990, establishing their offense level as level thirty-four (or, in some instances thirty-three) unless either the career offender guideline or Chapter 2 guideline applicable to the conviction, is higher. Under the **Stinson** court's rationale, however, the Armed Career Criminal Guideline would never be applied, because under **Stinson**, all armed career criminals would also be career offenders (even if their only instant offense of conviction were for possession of a firearm), and would invariably score higher as career offenders (level thirty-seven, Category VI based on §4B1.1's offense level for offenses punishable by life; an armed career criminal is punishable by fifteen years to life) than as armed career criminals under Guideline 4B1.4 (level thirty-four or thirty-three, possibly Category IV).[12]

In other words, the Eleventh Circuit's holding in **Stinson** renders Guideline 4B1.4 nugatory. Hence, the Eleventh

[11]Most, but not all, because the Armed Career Criminal Act ("ACCA") counts juvenile convictions, while the Career Offender guidelines do not, and the Career Offender provisions exclude convictions after a term of years, whereas the ACCA has no time limits on the use of prior convictions.

[12]Technically, the §4B1.4 armed career criminal guideline would apply still to the exceptional cases noted in footnote 10 above.

Circuit's rationale for its holding - that it was only overriding commentary, and a circuit court is not bound by commentary, as opposed to Congressionally mandated guidelines - does not withstand scrutiny.

Nor is it only the impact on Guideline 4B1.4 at issue in **Stinson I and II**. When the Sentencing Commission responded to the series of pre-1991 amendment circuit opinions that possession of a firearm either categorically (**O'Neal** and **Stinson I**), or on the facts of the case, was a crime of violence, by adding clarifying commentary to the contrary, it also amended (with Congressional approval) pre-existing Guideline §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms) to increase the range from twelve to twenty-four (and twenty-six in cases involving firearms listed in 26 U.S.C. §5845(a)) for felons in possession who had two prior crimes of violence or controlled substance offenses. But under the **Stinson I and II** rationales, new Guideline §2K2.1(a)(1) and (2) would never be applied, because in the Eleventh Circuit such defendants would always be career offenders and always subject to an enhanced punishment under §4B1.1.

Thus, the Eleventh Circuit in **Stinson** has, implicit in its holding, determined that Sentencing Guidelines §§2K2.1(a)(1), 2K2.1(a)(2) and 4B1.4 will never be applied.[13]

[13]Except in the narrow circumstances noted above as to §4B1.4 only.

CONCLUSION

Based (1) on the substantial conflict in the Circuits,in which the Eleventh Circuit now stands alone among nine circuits which have considered the issue, in holding that possession of a firearm by a felon is inherently a crime of violence, (2) on the Eleventh Circuit's total disregard of the United States Sentencing Commission's commentary, expressly prohibiting the inclusion of possession of a firearm by a felon as a crime of violence for Career Offender purposes, and (3) on the effect of the Eleventh Circuit's position in **Stinson** on Guidelines §§ 2K2.1(a)(1), 2K2.1(a)(2) and 4B1.4, that is, that they will not be applied in the Eleventh Circuit, Petitioner, Terry Lynn Stinson, respectfully prays this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

H. JAY STEVENS
Federal Public Defender

BY: _____
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APPENDIX

A. The published decision of the Eleventh Circuit Court of Appeals, issued October 4, 1991, reported at 943 F.2d 1268.

B. The published decision of the Eleventh Circuit Court of appeals issued March 20, 1992, reported at 957 F.2d 813.

most extraordinary circumstances. *See In re Ewing*, 54 B.R. at 955. Simple neglect will not justify nunc pro tunc approval of a debtor's application for the employment of a professional. *In re Arkansas Co.*, 798 F.2d 645, 649–50 (3d Cir.1986). This appeal does not present any extraordinary circumstances. The bankruptcy court, therefore, did not abuse its discretion in denying appellants' application for nunc pro tunc approval of debtors' employment of their attorney.

On appeal, the Bank requests this court impose an award of costs and attorney's fees against appellants pursuant to 10th Cir.R. 39 and 46.5. As the prevailing party, the Bank is entitled to an award of costs. Fed.R.App.P. 39(a).

Tenth Circuit Rule 46.5 provides for an award of expenses incurred, including reasonable attorney's fees, against an attorney who signs a brief which is not "well grounded in fact" or which is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Debtors' attorney received notice of the Bank's request for an award of fees, as it was included in the Bank's appellate brief, and the attorney had an opportunity to respond. *See Braley v. Campbell*, 832 F.2d 1504, 1514–15 (10th Cir.1987). Because appellants' argument on appeal is frivolous, we grant the Bank's request for an award of attorney's fees and the reasonable expenses incurred by the Bank in this appeal, to be imposed against debtors' attorney.

The order of the United States District Court for the District of Colorado is AFFIRMED. The cause is REMANDED to the district court for a determination of the amount of attorney's fees and costs the Bank incurred on appeal.

UNITED STATES of America, Plaintiff–Appellee,

v.

Terry Lynn STINSON, Defendant–Appellant.

No. 90–3711.

United States Court of Appeals, Eleventh Circuit.

Oct. 4, 1991.

Defendant pled guilty to five counts including bank robbery and possession of firearm by convicted felon and was sentenced under career offender provisions of guidelines by the United States District Court for the Middle District of Florida, No. 90–6 Cr-J-14, Susan H. Black, Chief Judge. Defendant appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) possession of firearm by felon was "crime of violence," and (2) application of amended Sentencing Guidelines did not violate constitutional protection against ex post facto laws.

Affirmed.

1. Criminal Law ⇐1202.2

Amended career offender provisions of Sentencing Guidelines and application notes applied when defendant was sentenced after their effective date. U.S.S.G. § 4B1.2, 18 U.S.C.A.App.; 18 U.S.C.A. § 3553(a)(5).

2. Criminal Law ⇐1202.2

Under career offender provisions of amended sentencing guideline and application note, sentencing court need not consider facts underlying particular offense to determine whether offense involves predicate "crime of violence"; offense is "crime of violence" if the offense by its nature presents serious risk of violence, whether or not violence actually materialized in specific conduct with which defendant is charged. U.S.S.G. §§ 4B1.2(1)(ii), 4B1.2, comment. (n.2), 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐1202.2

Possession of firearm by convicted felon always constitutes "crime of violence," whether or not injury results during defendant's possession of firearm and, thus, convicted felon found guilty of firearms possession may be subjected to sentence enhancement under career offender provisions of Sentencing Guidelines. U.S.S.G. § 4B1.2, 18 U.S.C.A.App.

4. Criminal Law ⇐1202.2

Felony defendant's conviction for possession of firearm qualified as "crime of violence," for purposes of imposition of enhanced sentence under "career offender" provisions of Sentencing Guidelines. U.S.S.G. § 4B1.2, 18 U.S.C.A.App.; 18 U.S.C.A. §§ 922(g), 924(e).

5. Constitutional Law ⇐203
Criminal Law ⇐1202.2

Imposing enhanced offense level sentence for possession of firearm, based on career offender provisions of Sentencing Guidelines which were amended after his offense but before sentencing, did not violate constitutional protection against ex post facto laws where defendant's sentence was not enhanced as result of application of newer guidelines and application notes. U.S.S.G. §§ 4B1.2, 4B1.2, comment. (nn.1–4), 18 U.S.C.A.App.

William M. Kent, Asst. Federal Public Defender, Jacksonville, Fla., for defendant-appellant.

Ronald T. Henry, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and EDMONDSON, Circuit Judges, and DYER, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

In this case, we decide whether a conviction for possession of a firearm by a felon qualifies as a "crime of violence" for purposes of enhancing a defendant's sentence under the "career offender" provisions of the Sentencing Guidelines. We conclude that illegal weapons possession by a convicted felon is inherently a "crime of violence" as defined by the Guidelines, and we affirm the sentence imposed by the district court.

I.

On October 31, 1989, defendant Terry Lynn Stinson robbed a bank in Florida. A few days later, defendant was arrested. At the time of his arrest, defendant was in possession of three inert hand grenades, ammunition, a number of components for the construction of bombs, a razor knife, and a sawed-off shotgun.

Defendant pled guilty to a five-count indictment charging him with bank robbery, in violation of 18 U.S.C. § 2113(a), (d), possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g) & 924(a)(2), (e),[1] use of a firearm during, and in relation to, a crime of violence, in violation of 18 U.S.C. § 924(c), weapons registration violation, in violation of 26 U.S.C. §§ 5861(d) & 5871, and transportation of stolen property through interstate commerce, in violation of 18 U.S.C. § 2312. Defendant had been earlier convicted of three violent felonies. In July 1990, defendant was sentenced under the career offender guidelines to 365 months imprisonment, consecutive to the mandatory minimum five-year imprisonment for use of a firearm during commission of a crime of violence.

II.

A. Career Offender Guidelines

1.

[1] This case is controlled by the career offender provisions, sections 4B1.1 and

1. Section 922(g) states in pertinent part:
(g) It shall be unlawful for any person—
(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
18 U.S.C. § 922(g).

4B1.2, of the Guidelines.[2] Under section 4B1.1, a defendant is a career offender if:

> (1) the defendant was at least eighteen years old at the time of the offense,
>
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and
>
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. Defendant argues that the district court's use of his possession of a firearm by a convicted felon conviction as the predicate "crime of violence" offense for career offender purposes under U.S.S.G. § 4B1.1, was improper. Defendant argues that possession of a firearm by a convicted felon is not a "crime of violence."

Section 4B1.2 defines the term "crime of violence," borrowing language from 18 U.S.C. § 924(e) of the Armed Career Criminal Act:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of injury to another.*

U.S.S.G. § 4B1.2 (1989) (emphasis added).

In the application notes to section 4B1.2, the Sentencing Commission has listed a number of crimes fitting this definition and has noted that other offenses are included where

> (A) that offense has an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (B) *the conduct set forth in the count of which the defendant was convicted* involved use of explosives or, *by its nature, presented a serious potential risk of physical injury to another.*

U.S.S.G. § 4B1.2, comment. (n. 2) (emphasis added).

The defendant's weapons possession conviction is not among those specifically listed in section 4B1.2 or its application notes, and does not have as a statutory element "the use, attempted use, or threatened use of physical force" as provided in section 4B1.2(1)(i) and application note 2(A). We therefore consider whether the weapons possession conviction satisfies the requirements of section 4B1.2(1)(ii) and application note 2(B).

2.

Defendant argues that we cannot look beyond the generic definition of the offense to determine whether weapons possession by a felon is a "crime of violence" under section 4B1.2(1)(ii) and application note 2(B). In support, defendant cites *United States v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir.1990), in which we held that the term "crime of violence," as used in an *earlier* version of the career offender guidelines, "contemplate[d] a generic category of offenses which typically present the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs."

[2] Such a categorical analysis certainly is allowed under the amended guidelines and application notes. Section 4B1.2(1)(ii), as amended, provides that an offense constitutes a "crime of violence" where it "involves conduct that presents a serious potential risk of physical injury to another." Application note 2, as amended, clarifies that an offense qualifies if "*by its nature*" that offense involves "a serious potential risk of physical injury to another." Under the amended guideline and application note, then, a sentencing court need not consider the facts underlying a particular offense, assuming such an inquiry is permissible, if the offense "by its nature" presents a serious risk of violence—the offense is a "crime of violence" whether or not the violence actually materialized in the specific conduct with which defendant is charged. Because we conclude that a categorical analysis is at least *permissible* under the amended guidelines, and because (as discussed *infra*) we think illegal firearm possession by a convicted felon "by its nature" imposes "a serious potential risk of physical injury," we need not decide today whether *Gonzalez-Lopez* should be applied to the guidelines and application notes as amended to *require* only a categorical analysis.[3]

2. Section 4B1.2 and its application notes were amended effective November 1, 1989. Because defendant was sentenced after that date, the amended guidelines and application notes apply. *See* 18 U.S.C. § 3553(a)(5) (sentencing courts are to apply the guidelines and policy statements "that are in effect on the date the defendant is sentenced"). We address further the applicability of the amended guidelines *infra* at sections II(A)(2) & (C).

B. Possession of a Firearm by a Felon as a "Crime of Violence"

[3] We must next consider, then, whether possession of a firearm by a convicted felon constitutes a "crime of violence" because the offense "by its nature

3. We note, however, that the holding in *Gonzalez-Lopez* is distinguishable on a number of grounds:

First, the amended version of § 4B1.2 applicable here takes its definition of the term "crime of violence" from a different source—18 U.S.C. § 924(e)—than the earlier version.

Second, the holding in *Gonzalez-Lopez* was influenced by the practical difficulties and potential unfairness to the defendant of allowing the sentencing court to determine, in an ad hoc mini-trial, the actual facts underlying prior convictions. *See Gonzalez-Lopez*, 911 F.2d at 547-48. Here, because the offense at issue is the offense of conviction, not a prior conviction, the district court would look only to conduct relevant to the instant proceedings, much like the sentencing court normally does in the course of sentencing a defendant pursuant to the Guidelines. *See* U.S.S.G. § 1B1.3(a)(1) (sentencing court may consider all conduct that occurred during the commission of the offense of conviction for which the defendant would be otherwise accountable).

Finally, the amended application note accompanying § 4B1.2 contains language that seems expressly to authorize sentencing courts to find crimes of violence even where the offense does not "by its nature" impose a serious risk of physical injury. *See* U.S.S.G. § 4B1.2, comment. (n. 2) (courts may look to "conduct set forth in the count of which the defendant was convicted" in deciding whether offense "presented a serious potential risk of physical injury to another") U.S.S.G. § 4B1.2, comment. (n. 2).

For these same reasons, the courts that have interpreted § 4B1.2 and its application notes—as amended—have allowed sentencing courts in some circumstances to look beyond the generic, categorical definition of an offense to the particular facts "set forth in the count of which the defendant was convicted." *See United States v. John*, 936 F.2d 764 (3d Cir.1991); *United States v. Cornelius*, 931 F.2d 490, 492-93 (8th Cir.1991); *United States v. Walker*, 930 F.2d 789, 793-94 (10th Cir.1991); *United States v. Tidswell*, 767 F.Supp. 11 (E.D.Me.1991); *United States v. Coble*, 756 F.Supp. 470, 474 (E.D.Wash.1991); *United States v. Hernandez*, 753 F.Supp. 1191, 1196 (S.D.N.Y.1990).

The Ninth Circuit has already concluded that, under the earlier version of section 4B1.2 and its application notes, "the offense of being a felon in possession of a firearm by its nature poses a substantial risk that physical force will be used against person or property." *United States v. O'Neal*, 910 F.2d 663, 667 (9th Cir.1990). In support the *O'Neal* court looked to the legislative history underlying 18 U.S.C. § 922(g),[4] including a statement by the original sponsor of that legislation to the effect that felons "may not be trusted to possess a firearm without becoming a threat to society." *Id.* (quoting 114 Cong. Rec. 14,773 (1968) (statement of Sen. Long)).

In a similar way, another court decided that, in the context of a pretrial detention hearing, illegal firearm possession by a felon always amounts to a "crime of violence," as defined by the Bail Reform Act.[5]

4. In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court similarly relied on legislative history to clarify what burglary-related offenses Congress intended to be included as "crimes of violence" when it specifically listed "burglary" as a violent crime for purposes of enhancing sentences pursuant to 18 U.S.C. § 924(e). *See id.* at ——, 110 S.Ct. at 2149-54.

5. The Bail Reform Act defines "crime of violence" in part as follows:

> . . . any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property

United States v. Jones, 651 F.Supp. 1309 (E.D.Mich.1987). The court in *Jones* offered four independent justifications for its conclusion that the offense of weapons possession by a felon "by its nature" involves a "substantial risk of physical force": (1) felons are more likely to use firearms in an irresponsible manner; (2) felons are acutely aware that such activity is illegal, making the act of weapons possession a knowing disregard for legal obligations imposed upon them; (3) felons are more likely to commit crimes, enhancing the likelihood the weapon will be used in a violent manner; and (4) illegal weapons possession is an ongoing offense that often is not ended voluntarily, but only through law enforcement intervention, thus "[t]he character of the crime cannot be measured solely as of the moment of discovery and arrest." *Jones*, 651 F.Supp. at 1310. *See also United States v. Phillips*, 732 F.Supp. 255, 262-63 (D.Mass.1990); *United States v. Johnson*, 704 F.Supp. 1398 (E.D.Mich.1988).

We find further support for the conclusion that the offense of weapons possession by a felon "by its nature" imposes a "serious potential risk of injury" in the legislative history behind 18 U.S.C. § 924(e), which streamlined the categories of persons unqualified to receive or possess firearms and established a stiff mandatory minimum punishment.[6] Section 924(e) was included as part of the Federal Firearms Owners Protection Act of 1986, which relaxed federal rules regarding private sales of firearms among sportsmen and collectors while simultaneously "enhanc[ing] the ability of law enforcement to fight *violent crime* and narcotics trafficking." H.R.Rep. No. 495, 99th Cong., 2d Sess. 1 (1986), U.S.Code Cong. & Admin.News 1986, 1327 (report from House Committee on the Judiciary) (emphasis added). Introducing the measure on the floor of the Senate, its sponsor Senator McClure outlined what he considered unduly aggressive federal enforcement of private weapons sales among collectors and sportsmen, and concluded, "We need to redirect law enforcement efforts away from what amounts to paperwork errors and *toward willful firearms law violations that will lead to violent crime; for example*, selling stolen guns, or *selling firearms to prohibited persons.*" 131 Cong.Rec. S9102 (daily ed. July 9, 1985) (statement of Sen. McClure) (emphasis added); *see also id.* at 9113 (statement of Sen. Laxalt) ("[This act] seeks to direct law enforcement efforts toward those firearms transactions most likely to contribute to *violent crime.*") (emphasis added); 131 Cong.Rec. S8700 (daily ed. June 24, 1985) (statement of Sen. Matsunaga) ("Handguns insofar as I am concerned, ... are intended for use for one purpose only; that is to kill other human beings. Whatever controls we can impose upon the sale and distribution of those weapons of death, I say let us go to it. I am relieved by the language of S.49 to the extent that it prohibits firearm and ammunition possession, receipt, or transportation in commerce by convicted felons....").

[4] Like the legislative body that criminalized weapons possession by convicted felons, we conclude that defendant's offense of conviction "by its nature" imposed a "serious risk of physical injury," whether or not injury results at the exact moment of arrest or anytime during defendant's ongoing possession of the firearm.[7] Because this offense always constitutes a "crime of violence," a convicted felon found guilty of firearms possession is automatically subject to sentence enhancement under the career offender provisions of the Sentencing Guidelines. A sentencing court need not look to the "conduct set forth in the count from which the defendant was convicted," if such an inquiry is permissible,[8] to determine whether a "crime of violence" has been committed.

of another may be used in the course of committing the offense.
18 U.S.C. § 3156(a)(4).

6. Defendant's indictment count for weapons possession alleged violations of both 18 U.S.C. § 922(g) and 18 U.S.C. § 924(e).

7. In reaching this result, we are unconstrained by dicta in the recent panel opinion in *United States v. Briggman*, 931 F.2d 705 (11th Cir.1991) (non-argument calendar). In *Briggman*, a panel of this court upheld an upward departure from the Guidelines in a case involving a conviction for weapons possession by a felon. By way of explaining the district court's decision to apply the Armed Career Criminal Act instead of the career offender guidelines for purposes of sentence enhancement, the panel said, "[T]he career offender provisions do not apply in this case because [the defendant's] crime was not one of violence." *Id.* at 710. The words of an opinion are not, in themselves, the holding of the case; the decision and the facts define a case's precedential authority. In *Briggman*, the defendant was sentenced pursuant to the Armed Career Criminal Act, not the career offender provisions of the Sentencing Guidelines. Because the excerpted statement—when read in context—was unnecessary to the outcome and was merely an explanation for an action by the district court that was unchallenged on appeal, we are not bound by the language cited from *Briggman*.

8. *See supra* section II(A)(2).

9. The panel opinion in *United States v. Simmons*, 924 F.2d 187 (11th Cir.1991), is not to the contrary. In that case, the panel acknowledged the passage of a new guideline that would have covered the offense charged, but the panel did not apply the guideline, ostensibly because "only those guidelines in effect at the time appellant committed the offense are applicable in sentencing appellant." *Id.* at 189 n. 1 (citing *United States v. Bradley*, 905 F.2d 359, 360 (11th Cir.1990)). The offense in *Simmons* was committed in November 1988, and according to the briefs in that case, the defendant was sentenced in September 1989. But, the new guideline at issue did not take effect until November 1990, more than a year *after sentencing*. As a result, *Simmons* is consistent with the general rule that sentencing courts are to apply the guidelines and policy statements in effect at the time of *sentencing*. The case relied upon by the *Simmons* panel supports this conclusion. In *United States v. Bradley*, the panel held that amendments to the guidelines taking effect *after sentencing* were inapplicable. *See Bradley*, 905 F.2d at 360.

C. *Ex Post Facto Application*

[5] Defendant contends that application of section 4B1.2, as amended *after* his offense but *before* sentencing, violates the constitutional protection against ex post facto laws. As noted *supra*, we are bound as a general matter by the specific instruction from Congress to consider the Sentencing Commission's guidelines and policy statements "that are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(5); *see also United States v. Russell*, 917 F.2d 512, 514 n. 2 (11th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 1427, 113 L.Ed.2d 479 (1991); *United States v. Marin*, 916 F.2d 1536, 1538 & n. 2 (11th Cir.1990) (per curiam); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 546 n. 3 (11th Cir.1990).[9] This circuit has made an exception, however, where the effect of applying an amended guideline "would be to subject a defendant to an increased sentence," thereby implicating the Constitution's prohibition on laws having ex post facto consequences. *United States v. Worthy*, 915 F.2d 1514, 1516 n. 7 (11th Cir.1990) (citing *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987)).

Defendant argues that under the *Gonzalez-Lopez* precedent, discussed *supra*, we would have been limited to a "categorical analysis" of the offense of conviction to determine whether it constitutes a "crime of violence" for career offender purposes. *See Gonzalez-Lopez*, 911 F.2d at 547 (offense is considered "crime of violence" if it "typically present[s] the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs"). But, our conclusion that illegal firearm possession by a felon "'by its nature' impose[s] a 'serious risk of physical injury,' whether or not that risk materialized at the exact moment of arrest, or anytime during defendant's ongoing possession of the firearm" also satisfies the *Gonzalez-Lopez* standard. Defendant's sentence was not enhanced as a result of our application of the newer guidelines and application notes; the Ex Post Facto Clause is not implicated.

III.

Because defendant's instant conviction for weapons possession by a felon is a "crime of violence," as defined in section 4B1.2 and its application notes, the district court properly enhanced defendant's sentence under the career offender provisions of the Sentencing Guidelines. We AFFIRM.

when a corporate officer absconds with them for "personal reasons."

VI. CONCLUSION

Our review of the record in this case, as well as the briefs submitted by the parties, persuades us that the district court properly held that the purely corporate documents in Paul's custody must be produced, regardless of the reasons for which Paul acquired them, and regardless of Paul's subsequent termination from the bank. Accordingly, for the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Terry Lynn STINSON, Defendant-Appellant.

No. 90-3711.

United States Court of Appeals, Eleventh Circuit.

March 20, 1992.

Defendant was convicted in the United States District Court for the Middle District of Florida, No. 90-6-Cr-J-14, Susan H. Black, Chief Judge, of various offenses, including bank robbery and possession of a firearm by a convicted felon, and was sentenced under career offender provisions of the Sentencing Guidelines. Defendant appealed. The Court of Appeals, 943 F.2d 1268, affirmed, and defendant petitioned for rehearing. The Court of Appeals held that Sentencing Commission's amendment to Sentencing Guidelines' commentary, stating that offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, was not binding on Court of Appeals until Congress amended language of Guidelines to exclude specifically possession of firearm by a felon as a "crime of violence."

Rehearing denied.

1. **Criminal Law** ⇐1202.2, 1202.3

Sentencing Commission's amendment to Sentencing Guidelines' commentary, stating that offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, was not binding on Court of Appeals until Congress amended language of Guidelines to exclude specifically possession of firearm by a felon as a "crime of violence." U.S.S.G. §§ 4B1.2, 4B1.2, comment., 18 U.S.C.A.App.

2. **Statutes** ⇐217.4

Generally, courts only turn to legislative history when statute is ambiguous on its face.

3. **Criminal Law** ⇐1239

Although Sentencing Guidelines commentary should generally be regarded as persuasive, it is not binding. 28 U.S.C.A. § 994(p); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

William M. Kent, Asst. Federal Public Defender, Jacksonville, Fla., for defendant-appellant.

Ronald T. Henry, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING

Before EDMONDSON, Circuit Judge, DYER and JOHNSON *, Senior Circuit Judges.

Appeals for the Eleventh Circuit.

* *See* Rule 34-2(b), Rules of the U.S. Court of

PER CURIAM:

[1] This case is before us on a petition for rehearing. Appellant, Terry Lynn Stinson, argues that the Sentencing Commission's recent amendment to the commentary to U.S.S.G. § 4B1.2, which states that the offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, is retroactive and applicable to appellant's sentence.

We earlier determined that the law that was in effect when appellant was sentenced was that possession of a firearm by a convicted felon was categorically a "crime of violence." *United States v. Stinson*, 943 F.2d 1268 (11th Cir.1991). We were not alone in this interpretation of Guidelines § 4B1.2. At least four other circuits have held that, for sentencing purposes, firearms possession by a convicted felon either is a crime of violence or, at least, could in some circumstances be considered a crime of violence. *See United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1990) (holding that offense of possession of firearm by felon is "crime of violence" within the meaning of Guidelines § 4B1.2); *see also United States v. Alvarez*, 914 F.2d 915 (7th Cir.1990) (applying a "facts of the case" analysis for whether or not possession of firearm by felon is crime of violence); *United States v. Goodman*, 914 F.2d 696 (5th Cir.1990) (same); *United States v. Williams*, 892 F.2d 296 (3d Cir. 1989) (same). Before the Commission amended the commentary, no circuit court had concluded that section 4B1.2's term "crime of violence" excluded the offense of unlawful possession of a firearm by a felon.[1]

The Commission's alteration consisted of the following sentence, which was added to section 4B1.2's commentary: "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." United States Sentencing Comm'n, Guidelines Manual, Ch. 4, Pt. B, comment., n. 2 (Nov. 1, 1991). The substance of the Commission's change in the commentary runs directly counter to the substantial volume of precedent interpreting section 4B1.2.

The Commission's amendment did not alter the actual text of section 4B1.2; instead, it merely changed the commentary. The text of section 4B1.2 was exactly the same in October 1989, when appellant committed his offense, as it is now. When we are faced with the question of whether we should reverse our decision and also ignore precedent from other circuits because of a change in guideline commentary, it is crucial to examine closely the appropriate weight to be afforded to the commentary.

The Sentencing Reform Act of 1984, which authorized the guideline system, tells the courts to consider pertinent policy statements issued by the Sentencing Commission that are in effect on the date the defendant is sentenced. 18 U.S.C. § 3553(a)(5). The Guidelines themselves contain a section which specifically addresses the question of what weight is to be given the commentary; U.S.S.G. § 1B1.7 states that "commentary is to be treated as the equivalent of a policy statement." The commentary to section 1B1.7 in turn states that "the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." U.S.S.G. § 1B1.7, comment.

[2] In general, courts only turn to legislative history when a statute is ambiguous on its face. *See Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). In this case, because section 4B1.2's term "crime of violence" was less than clear, we looked to the commentary to clarify the meaning of "crime of violence." But, when we originally interpreted this section, the commentary was silent about whether possession of a firearm by a felon was to be included as a "crime of violence." This new commentary coming after we had

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though commentary sh
regarded as persuasive,

1. Since the amendment, two circuits have relied, in part, on the amendment to the commentary to conclude that a crime of violence does not include "possession of a firearm by a felon." *See United States v. Fitzhugh*, 954 F.2d 253 (5th Cir. Jan. 28, 1992); *United States v. Johnson*, 953 F.2d 110 (4th Cir.1991).

2. *See* 28 U.S.C. § 994(p). commentary does not go tensive review process as selves, for if they did shar there would no basis for the guidelines and the co would be no reason for th or to have the different w line commentary, itself, s

3. In upholding the constitu lines in the face of a co based on excessive delegati er grounds, the Supreme *United States*, 488 U.S. 36 102 L.Ed.2d 714 (1989), s mission is fully accountab

construed the guidelines, raises the question of what effect should be given a post hoc change in the commentary—or newly created "legislative history"—by the Sentencing Commission.

A brief review of the Sentencing Guidelines enactment procedures seems appropriate. After the Sentencing Commission's initial guidelines were submitted to Congress, and after the prescribed period of congressional review, the guidelines took effect on November 1, 1987. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p). Yet, the commentary is never officially passed upon by Congress. According to the enabling statute, Congress is only charged with reviewing the amendments to the guidelines.[2] If there is no change to a particular guideline, but the Commission alters that section's commentary, there is no evidence that Congress reviews it or is even notified of the alteration.[3]

[3] Therefore, we must be mindful of the limited authority of the commentary. We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts. As far as we can tell, at no point has this change been called to Congress's attention, much less, been authorized by Congress. Although commentary should generally be regarded as persuasive, it is not binding. *See United States v. Elmendorf*, 945 F.2d 989 (7th Cir.1991); *United States v. Pinto*, 875 F.2d 143, 144 (7th Cir.1989). We decline to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a "crime of violence." [4]

Therefore, we stand by our original interpretation of section 4B1.2: that possession of a firearm by a felon inherently constitutes a "crime of violence." Accordingly, appellant's sentence is affirmed and the motion for rehearing is DENIED.

C & W LEASING, INC., Plaintiff–Counter–Defendant–Appellant,

v.

ORIX CREDIT ALLIANCE, INC., Defendant–Counterclaim Appellee.

No. 89–4012.

United States Court of Appeals, Eleventh Circuit.

April 1, 1992.

After prepaying loan, borrower brought action against lender that included claims of fraud, conversion, and nonjury

2. *See* 28 U.S.C. § 994(p). We assume that the commentary does not go through the same intensive review process as the guidelines themselves, for if they did share the same procedure, there would no basis for a distinction between the guidelines and the commentary; and there would be no reason for them to exist separately or to have the different weight which the guideline commentary, itself, says exists.

3. In upholding the constitutionality of the guidelines in the face of a constitutional challenge based on excessive delegation of legislative power grounds, the Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 666, 102 L.Ed.2d 714 (1989), stated that "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines ..." We note, however, that there is no mention that Congress has the power to amend directly the guidelines' commentary which we see as uniquely the Commission's work product.

4. Of course, it would be equally satisfactory if the Commission changed the text of the guidelines to exclude firearm possession and submitted the altered text for congressional review during the prescribed period. *See* 28 U.S.C. § 994(p). This practice would ensure that Congress passes upon the amendment and that there is no improper delegation of legislative power. *See Mistretta*, 488 U.S. at 394–395, 109 S.Ct. at 666.

No. 91-8685

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
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QUESTION PRESENTED

Whether possession of a firearm by a convicted felon is a crime of violence for purposes of the 1989 version of the career offender Guideline, Sentencing Guidelines §§ 4B1.1 and 4B1.2 (Nov. 1, 1989).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 91-8685

TERRY LYNN STINSON, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES
IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence, Pet. App. A, is reported at 943 F.2d 1268. The opinion of the court of appeals denying the petition for rehearing, Pet. App. B, is reported at 957 F.2d 813.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1991. A petition for rehearing was denied on March 20, 1992. The petition for a writ of certiorari was filed on June 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to a five-count indictment that charged him with bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (Count 1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g) (Count 2); use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (Count 3); possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d) (Count 4); and transportation of stolen property in interstate commerce, in violation of 18 U.S.C. 2312 (Count 5). He was sentenced as a career offender to concurrent terms of 365 months' imprisonment on Counts 1, 2, 4, and 5, and to a mandatory minimum consecutive term of five years' imprisonment on Count 3, to be followed by five years' supervised release. The court of appeals affirmed.

1. Petitioner, an escapee from the Mississippi Department of Corrections, robbed a bank in Jacksonville, Florida, on October 31, 1989. During the robbery, petitioner carried a police scanner and a hand grenade. He demanded money from a bank employee and threatened to throw the grenade into her lap if she failed to comply. The employee instructed a teller to give petitioner the money. While the teller was putting money into a plastic bag supplied by petitioner, petitioner displayed a sawed-off shotgun and pointed it at the first employee's face. The teller gave petitioner $9,427. Petitioner then ordered everyone in the bank to lie down, and he threw the grenade, which was later found to be inert, onto the floor. He fled in a pick-up truck that he had

stolen from his employer. Pet. App. 1269; Gov't C.A. Br. 3; Pet. C.A. Br. 3-6; Presentence Report 7, 8, 12; Sent. Tr. 19-20, 63, 69.

Petitioner drove to his apartment, where he got out of the pick-up truck and entered a van that he had stolen earlier that day. He stole the van by persuading a salesman at a car dealership that he wanted to test drive it. During the test drive, petitioner pulled a gun on the salesman. Petitioner drove the van to his apartment, where he restrained the salesman with handcuffs and rope and confined him in a closet. Petitioner warned the salesman that the apartment was rigged with a bomb set to explode if the closet was opened. Gov't C.A. Br. 3; Pet. C.A. Br. 5.

Petitioner drove the van to Mississippi, where he was arrested on November 3, 1989. He was found in possession of the sawed-off shotgun, a police scanner, three inert hand grenades, ammunition, bomb components, and knives. When police located the pick-up truck, they found that it contained a pipe bomb as well as the sawed-off section of the barrel of the shotgun that petitioner had used during the robbery. Pet. App. 1269; Sent. Tr. 50-55; Gov't C.A. Br. 3-4; Pet. C.A. Br. 4-5.

2. The district court sentenced petitioner in July 1990. The court found that petitioner was a career offender under Sentencing Guidelines § 4B1.1 (Nov. 1, 1989). That Guideline provides that a defendant is a career offender if "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant

has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Petitioner was over 18 and had three prior convictions for crimes of violence. The court used petitioner's instant conviction for being a felon in possession of a firearm as the predicate "crime of violence" required by the second prong of the career offender definition.[1] In so doing, the court rejected petitioner's contention that that offense did not constitute a crime of violence for career offender purposes. The court reasoned that "possession of a firearm by a convicted felon is a crime of violence both by its nature and how the weapon was used in this case." Pet. App. 1269-1270; Sent. Tr. 26-32, 40.

Petitioner's adjusted offense level was 35 and his criminal history category was VI, yielding a sentencing range of 292-365 months. Sent. Tr. 47, 80. The court sentenced petitioner at the top of the range "due to the continuing and persistent danger that [he] continues to present to the public and a history of assaultive

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[1] Sentencing Guidelines § 4B1.2 (Nov. 1, 1989) provides in pertinent part:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that --
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

and violent behavior, as evidenced by the offender's past criminal record." Judgment and Commitment Order 5.

3. a. On October 4, 1991, the court of appeals affirmed petitioner's conviction and sentence. Pet. App. A. As an initial matter, the court held that the November 1, 1989, version of the Sentencing Guidelines applied to petitioner. The court noted that petitioner was sentenced after that date and that 18 U.S.C. 3553(a)(5) directs sentencing courts to apply the Guidelines and policy statements that are in effect on the date of sentencing. Pet. App. 1270 n.2. Next, the court held that possession of a firearm by a convicted felon is "inherently" a crime of violence under Sentencing Guidelines § 4B1.2(1)(ii) (Nov. 1, 1989). Pet. App. 1269. That Guideline defined "crime of violence" in part as a crime that "involves conduct that presents a serious potential risk of injury to another." The court also relied on Application Note 2 to the 1989 version of Sentencing Guidelines § 4B1.2, which explained that the term "crime of violence" includes offenses in which "the conduct set forth in the count of which the defendant was convicted * * * by its nature, presented a serious potential risk of physical injury to another." Pet. App. 1270-1273.[2]

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[2] The court rejected petitioner's contention that the application of Guidelines § 4B1.2, as amended after the date of his offense but before sentencing, violated the Ex Post Facto Clause. The court reasoned that petitioner's sentence "was not enhanced as a result of our application of the newer guidelines and application notes," because possession of a firearm by a convicted felon also constituted a crime of violence under the earlier (November 1, 1988) version of the Sentencing Guidelines. Pet. App. 1273.

b. As of November 1, 1991, the Sentencing Commission amended the commentary to Sentencing Guidelines § 4B1.2 to state that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." Sentencing Guidelines § 4B1.2, Application Note 2 (Nov. 1, 1991). Petitioner thereupon sought rehearing in the court of appeals, contending that the amended commentary should apply retroactively to his sentence.

The court of appeals denied rehearing. Pet. App. B. The court adhered to its original interpretation of Sentencing Guidelines § 4B1.2, i.e., "that possession of a firearm by a felon inherently constitutes a 'crime of violence.'" Pet. App. 815. The court observed that, before the amendment to the commentary, at least four other circuits had held that a felon's possession of a firearm either was inherently a crime of violence or could qualify as a crime of violence in some circumstances. Pet. App. 814. The court expressed "doubt [that] the Commission's amendment to Section 4B1.2's commentary can nullify the precedent of the circuit courts." Pet. App. 815. The 1991 commentary to Section 4B1.2 had "limited authority," in the court's view, because it had not "been called to Congress' attention, much less, been authorized by Congress." Pet. App. 815. Accordingly, the court "decline[d] to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a 'crime of violence'" or until the Commission does so and submits the altered text for congressional review. Pet. App. 815 & n.4.

ARGUMENT

Petitioner renews his contention that possession of a firearm by a convicted felon was not a "crime of violence" under the 1989 version of the career offender Guideline, Sentencing Guidelines §§ 4B1.1 and 4B1.2 (Nov. 1, 1989). Pet. 11-22. He relies principally on the amendment to the commentary accompanying Sentencing Guidelines § 4B1.2 that became effective after his sentencing and after the affirmance of his conviction and sentence by the court of appeals. The commentary to Section 4B1.2 now states that a "crime of violence" does not include "the offense of unlawful possession of a firearm by a felon." Sentencing Guidelines § 4B1.2, Application Note 2 (Nov. 1, 1991).[3]

At the time petitioner was sentenced, the commentary to Section 4B1.2 did not contain the language on which petitioner relies. As petitioner concedes, moreover, the courts of appeals that considered the question before the commentary was amended concluded that a felon-in-possession offense could be a "crime of violence" for career offender purposes. Pet. 13-14. Those courts either permitted sentencing courts to look beyond the elements of the offense of conviction in determining whether a felon-in-possession offense was a crime of violence or treated such an offense, standing alone, as a crime of violence. See, e.g., United

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[3] Petitioner concedes that he is eligible for sentencing as a career offender, but argues that only his instant conviction for armed bank robbery qualified as the predicate crime of violence. Pet. 11 n.2. As petitioner notes, ibid., the use of his robbery conviction as the predicate crime of violence would have resulted in an adjusted offense level of 32 instead of 35, and a sentencing range of 210-262 months instead of 292-365 months.

States v. Cornelius, 931 F.2d 490, 493 (8th Cir. 1991) (considering underlying conduct in determining whether felon-in-possession offense is a crime of violence); United States v. Walker, 930 F.2d 789, 793-794 (10th Cir. 1991) (same); United States v. Alvarez, 914 F.2d 915, 918 (7th Cir. 1990) (same), cert. denied, 111 S. Ct. 2057 (1991); United States v. Goodman, 914 F.2d 696, 699 (5th Cir. 1990) (same); United States v. Williams, 892 F.2d 296, 303-304 (3d Cir. 1989) (same), cert. denied, 496 U.S. 939 (1990); United States v. O'Neal, 910 F.2d 663, 667 (9th Cir. 1990), amended, 937 F.2d 1369, 1375 (1991) (felon-in-possession offense is "by its nature" a crime of violence). Section 4B1.2(1)(ii) specifies certain offenses -- burglary of a dwelling, arson, extortion, and offenses involving explosives -- as "crimes of violence," but it then adds a catch-all provision reaching any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Moreover, the background of the commentary to Guidelines § 1B1.3 states that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Thus, at least where the underlying conduct presented a serious risk of physical harm, the courts of appeals properly treated felon-in-possession offenses as crimes of violence prior to the 1991 amendment.

Under the version of the Sentencing Guidelines in effect when petitioner was sentenced in July 1990, his felon-in-possession offense was a crime of violence because it "involved" the serious

potential risk of physical injury to another. The district court found that that offense was a crime of violence not only "by its nature" but also based on "how the weapon was used in this case." Sent. Tr. 40. Petitioner concedes that while robbing the bank he stuck a sawed-off shotgun in a bank employee's face. Pet. 5-6. Under these circumstances, the court was entirely justified in treating petitioner's offense as a crime of violence under the 1989 version of Sentencing Guidelines § 4B1.2. To be sure, petitioner's offense would not have been a "crime of violence" under the commentary to Sentencing Guidelines § 4B1.2 that became effective on November 1, 1991, after petitioner was sentenced and his sentence was affirmed on appeal. That commentary specifically excludes unlawful possession of a weapon by a felon from the category of "crimes of violence." Sentencing Guidelines § 4B1.2, Application Note 2 (Nov. 1, 1991). Petitioner argues that the 1991 commentary is relevant to his case because it indicates how the Sentencing Commission intended the pre-1991 version of Sentencing Guidelines § 4B1.2 to be interpreted. That assertion is incorrect and in any event does not merit further review.[4]

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[4] In a footnote, Pet. 12 n.3, petitioner asserts, without elaboration, that his sentencing under the November 1, 1989, Guidelines also raises a "concern" under the Ex Post Facto Clause, Art. I, § 9, Cl. 3. Although petitioner states that that concern "will be addressed" later in the petition, Pet. 12 n.3, he does not discuss it apart from making a passing reference in a subsequent footnote, see Pet. 17 n.8, to his having argued below "that application of the post October 31, 1989 amendments to the etent they allowed for examination of actual offense conduct, would violate the Ex Post Facto [Clause]." In any event, there is no force to his ex post facto argument; the law in effect at the time of his sentencing was the same in all pertinent respects as the law in effect at the time of his offense. Compare Sentencing

In light of the pre-1991 case law holding that a sentencing court could look beyond the face of an indictment to determine whether a defendant had committed a crime of violence, the November 1, 1991, amendment to the commentary to Section 4B1.2 is properly viewed as effecting a substantive change in the Guidelines, rather than as merely making explicit a principle that the Guidelines had previously embraced. Although the Sentencing Commission referred to the pertinent changes as "clarif[ying]" the meaning of Section 4B1.2, Guidelines App. C.254, amendment 433; see also 57 Fed. Reg. 20148, 20157 (May 11, 1992), the Commission's characterization of a change in the commentary does not require a court to give retroactive effect to the change if the change is made after the defendant's sentencing. See, e.g., United States v. Mondaine, 956 F.2d 939, 942 (10th Cir. 1992); United States v. Guerrero, 863 F.2d 245, 250 (2d Cir. 1988).

In any event, because the question presented in this case is relevant only to cases in which sentence was imposed under Sentencing Guidelines § 4B1.2 before November 1, 1991, that question is of diminishing importance. It is true, as petitioner points out, Pet. 16-17, that in the wake of the 1991 amendment some courts have held that the felon-in-possession offense can constitute a crime of violence in pre-amendment cases only if aggravating circumstances are alleged in the count charging that offense, see United States v. Johnson, 953 F.2d 110, 112-115 (4th Cir. 1992);

Guidelines § 4B1.2 & Application Note 1 (Jan. 15, 1988) with Sentencing Guidelines § 4B1.2 Nov. 1, 1989).

United States v. Samuels, No. 91-5429 (4th Cir. June 22, 1992), slip op. 4-5; United States v. Fitzhugh, 954 F.2d 253 (5th Cir. 1992); United States v. Sahakian, 965 F.2d 740 (9th Cir. 1992). Other courts have applied the 1991 amendment to sentences imposed before its effective date. See United States v. Bell, No. 91-1965 (1st Cir. June 10, 1992), slip op. 11; United States v. Shano, 955 F.2d 291, 295 (5th Cir. 1992) (withdrawing United States v. Shano, 947 F.2d 1263 (5th Cir. 1991)), cert. dismissed, 112 S. Ct. 1520 (1992). Nonetheless, the only cases affected by that disagreement are those antedating the November 1, 1991, amendment to Section 4B1.2. The disagreement among the courts as to the proper dispostion of that closed set of cases does not require resolution by this Court.[5]

On May 1, 1992, the Sentencing Commission submitted the revised commentary to Section 4B1.2 to Congress for its review. See 57 Fed. Reg. 20148, 20157 (May 11, 1992). That action would seem to eliminate the court of appeals' principal reason for

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[5] In light of the change in the law of the Fifth Circuit on this issue, this Court summarily disposed of Kyle v. United States, 112 S. Ct. 2959 (1992), which presented the question whether the felon-in-possession offense was a crime of violence for career offender purposes under the November 1, 1989, version of the Sentencing Guidelines. The Court vacated the court of appeals' judgment and remanded the case to the Fifth Circuit for further consideration in light of the 1991 amendment to Section 4B1.2's commentary and the Fifth Circuit's intervening decision in United States v. Shano, supra, which held that the amendment was a clarifying one applicable to cases on direct appeal even if a defendant was sentenced before the effective date of the amendment. This Court's disposition of Kyle does not require the same disposition of this case, because the court of appeals has already considered the applicability of the 1991 amendment to petitioner's status as a career offender.

"declin[ing] to be bound" by the amendment, i.e., that "there is no evidence that Congress review[ed] it or [was] even notified of the alteration." Pet. App. 815. Congressional review of the amendment also moots petitioner's claim, Pet. 18-19, that the court of appeals' refusal to follow the amended commentary in the absence of such review is inconsistent with Williams v. United States, 112 S. Ct. 1112, 1119 (1992), which teaches that "a policy statement that prohibits a district court from taking a specified action [is] an authoritative guide to the meaning of the applicable guideline," and in turn with Sentencing Guidelines § 1B1.7, which states that "commentary is to be treated as the legal equivalent of a policy statement."[6]

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[6] Moreover, the court of appeals' position on this issue may yet be subject to further change. After the denial of petitioner's petition for rehearing, a different panel of the court of appeals expressed doubt about the correctness of the court's decision in this case. In United States v. Bruce, 965 F.2d 1000 (11th Cir. 1992) (per curiam), the panel relied on the decision below in affirming the enhancement of a sentence on the ground that possession of a firearm by a convicted felon is a crime of violence. The opinion stated, however, that two members of the panel voted to affirm only because they believed themselves bound by the decision below; they "would not have adopted" its per se rule as an initial matter "[b]ecause possession of a firearm in many instances could in no way be a violent act as a matter of actual fact * * *." Id. at 1000. Thus, the full court of appeals may yet decide that this rule should not be the law of the circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON, PETITIONER)
)
V) NO. 91-8685
)
UNITED STATES OF AMERICA)

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on August 20, 1992.

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August 20, 1992

NO. 91-8685

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OCTOBER TERM, 1992

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QUESTION PRESENTED FOR REVIEW

Whether possession of a firearm by a felon is a "crime of violence," as that term is used in the Career Offender provisions of the Federal Sentencing Guidelines, §§4B1.1 and 4B1.2?

PETITIONER STINSON'S SUPPLEMENTAL REPLY
TO GOVERNMENT'S BRIEF IN OPPOSITION

In its reply brief in opposition to Stinson's petition for certiorari, the Government apparently misstates the effect of the Eleventh Circuit's holding in **United States v. Stinson**, 957 F.2d 813 (11th Cir. 1992), [**Stinson II**]. At page eleven of its brief in opposition the Government argues:

> "Nonetheless, the only cases affected by that disagreement [the disagreement between the circuits whether the November 1, 1991 amendment to application note 2 to the commentary to Sentencing Guideline 4B1.2, which states that possession of a firearm by a felon is not a crime of violence, is to be applied "retroactively" to sentencings that occurred prior to the effective date of the amendment] are those antedating the November 1, 1991, amendment to Section 4B1.2. The disagreement among the courts as to the proper disposition of that closed set of cases does not require resolution by this Court."

This implies that, in any event, all circuits, including the Eleventh Circuit, will apply the new commentary to sentencings occurring after the effective date of the amendment to the commentary, that is, after November 1, 1991. This simply is not correct. The Eleventh Circuit made it quite plain in its holding in **Stinson II** that it will continue to refuse to follow the Sentencing Commission's amendments to the **commentary** unless and until **Congress** approves an amendment to the **Guideline** itself.[1] The Eleventh Circuit explained its holding as follows:

> "The Commission's amendment did not alter the actual text of section 4B1.2; instead, it merely changed the commentary . . . When we are faced with the question of whether we should reverse our decision and also ignore precedent from other circuits because of a change in guideline commentary, it is crucial to examine closely the appropriate weight to be afforded to the commentary . . . This new commentary coming after we had construed the guidelines, raises the question of what effect should be given a post hoc change in the commentary . . . the commentary is never officially passed upon by Congress . . . Congress is only charged with reviewing amendments to the guidelines . . . If there is no change to a particular guideline, but the Commission alters that section's commentary, there is no evidence Congress reviews it . . . We note, however, that there is no mention [in **Mistretta**] that Congress has the power to amend directly the guidelines' commentary which we see as uniquely the Commission's work product . . . We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts . . . **We decline to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2' language to exclude specifically the possession of a firearm by a felon as a 'crime of violence.'**"

Under the holding of **Stinson II**, the Eleventh Circuit will continue to apply the career offender enhancements to felons in possession both for defendants sentenced before and after the November 1, 1991 effective date of the new commentary.[2]

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[1] There have not yet been any reported decisions out of the Eleventh Circuit involving post-amendment sentencings. However, it is counsel's experience that **Stinson II** is in fact being applied to post November 1, 1991 sentencings, that is, defendants with a count of conviction as a felon in possession are currently being sentenced as career offenders in the Middle District of Florida in reliance on **Stinson II**, and that is the policy of the United States Probation Office for this District.

[2] It may not only be the Eleventh Circuit that will apply the amendment in this manner. As the Government reads the post-amendment decisions from the Fourth, Fifth and Ninth Circuits, **United States v. Johnson**, 953 F.2d 110 (4th Cir. 1992), **United States v. Samuels**, No. 91-5429 (4th Cir. June 22, 1992), **United States v. Fitzhugh**, 954 F.2d 253 (5th Cir. 1992) and **United States v. Sahakian**, 965 F.2d 740 (9th Cir. 1992), those circuits will continue to apply the career

Thus, it is not a "closed set of cases," but an unbounded set of cases, of significant impact as to each individual so sentenced. Therefore, the Government's policy argument against this Court granting certiorari to Stinson is based on a false premise.

In any event, the Government's misunderstanding of the holding in **Stinson II** relates only to the Government's policy argument against this Court granting certiorari. The Government's legal argument against Stinson rests on only one position: that the amendment to the commentary to guideline section 4B1.2 is not retroactive and hence does not apply to Stinson's case, because Stinson was sentenced before the effective date of the amendment.[3]

The Government, at pages nine and ten of the Brief of the United States in Opposition, argues:

> "Petitioner argues that the 1991 commentary is relevant to his case because it indicates how the Sentencing Commission intended the pre-1991 version of Sentencing Guidelines § 4B1.2 to be interpreted. That assertion is incorrect and in any event does not merit further review . . . [T]he November 1, 1991, amendment to the commentary to Section 4B1.2 is properly viewed as effecting a substantive change in the Guidelines, rather than as merely making explicit a principle that the Guidelines had previously embraced. Although the Sentencing Commission referred to the pertinent changes as 'clarif[ying]' the meaning of Section 4B1.2, Guidelines App. C.254, amendment 433; see also 57 Fed. Reg. 20148, 20157 (May 11, 1992), the Commission's characterization of a change in the commentary does not require a court to give retroactive effect to the change if the change is made after the defendant's sentencing. [citing authority]."

If there was any force to this argument, it has been lost by the recent action taken by the United States Sentencing Commission. **On August 26, 1992, the Sentencing Commission adopted an amendment to Guideline §1B1.10 (Retroactivity of Amended Guideline Range), expressly making amendment 433 (the amendment to application note two to the commentary to §4B1.2) retroactive. A copy of the amendment is set forth in full in the appendix hereto.**

Because the Government rests its opposition to Stinson's petition on the lack of retroactivity of the amended commentary, and given that the Sentencing Commission has now addressed that issue and expressed itself to the contrary, it would seem that the government has no legal basis for opposing Stinson's petition.[4]

---

offender enhancement to felons in possession, notwithstanding the commentary explaining that the charge of felon in possession is not a crime of violence for career offender purposes, if "aggravating circumstances are alleged in the count charging that offense." [Brief of the United States in Opposition at p. 10.] Also, the Sixth Circuit, in **United States v. Beckley**, No. 91-6177 (6th Cir. July 22, 1992), seems to hold that it will look to the circumstances of the offense in determining whether possession of a firearm by a felon is a crime of violence, irrespective of the new commentary.

[3] The government in effect concedes that if the amendment in question were retroactive, then Stinson should have been sentenced in accordance with it. For example, at page nine of the Government's Brief in Opposition, the Government states: "To be sure, petitioner's offense would not have been a 'crime of violence' under the commentary to Sentencing Guidelines § 4B1.2 that became effective on November 1, 1991, after petitioner was sentenced and his sentence was affirmed on appeal." At page ten of its brief, the Government accordingly concludes: "[T]he question in this case is relevant only to cases in which sentence was imposed under Sentencing Guidelines § 4B1.2 before November 1, 1991 . . ."

[4] Apparently because the government rested its entire opposition on the asserted lack of retroactivity of the commentary, the Government chose to not address Stinson's other arguments, for example, Stinson's challenge to the

In 1764, Cesare Beccaria in Of Crimes and Punishments set forth the maxim that has guided courts for two centuries since:

nulla poena sine lege:[5]

Today, Terry Lynn Stinson and untold other American criminal defendants are imprisoned under sentences that are illegal. The Eleventh Circuit denied Stinson's petition for rehearing, and later separately denied his petition for rehearing en banc. This Court and this petition for certiorari is Stinson's last resort for justice.

Respectfully submitted,

H. JAY STEVENS
Federal Public Defender

By _____
William Mallory Kent
Assistant Federal Defender
Florida Bar No. 0260738
P.O. Box 4998
Jacksonville, Florida 32201
(904) 232-3039

Eleventh Circuit's holding that possession of a firearm is "by its nature," irrespective of the underlying circumstances or conduct reflected in the charging instrument, a "crime of violence." Apparently the government's misreading of the holding in **Stinson II** led the Government to ignore Stinson's analysis of the impact on the guidelines of the Eleventh Circuit's holding, i.e., that new guideline §4B1.4 (Armed Career Criminal) will, under the **Stinson II** holding, never be applied in the Eleventh Circuit, nor will guideline §§2K2.1(a)(1) and (2) be applied. These arguments may continue to be of significance if this Court were otherwise to agree with the Eleventh Circuit that commentary cannot override circuit court authority, although such a position would not be in harmony with this Court's reasoning in **Williams v. United States**, __ U.S. __, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992).

[5] Of Crimes and Punishments, The Library of Liberal Arts, Translated by Henry Paolucci, 1963, p.19.

APPENDIX

A. Amendment to Guideline §1B1.10

§1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.

(b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time.

(c) *Provided*, that a reduction in a defendant's term of imprisonment may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.

(d) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 379, ~~and~~ 380, 433, 448, and 461.

* * *

Reason for Amendment: This amendment expands the listing in subsection (d) to implement the directive in 28 U.S.C. § 994(u) in respect to the guideline amendments effective November 1, 1992. See attached memorandum.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 91-8685

TERRY LYNN STINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

This brief is filed to bring to the attention of the Court a matter that occurred after the filing of our brief in opposition in this case.

On September 16, 1992, the United States Sentencing Commission published in the Federal Register a notice regarding revisions to the Sentencing Guidelines. 57 Fed. Reg. 42,804. One of the revisions that the Commission made was to Sentencing Guidelines § 1B1.10(d) (Policy Statement). That provision lists the amendments to the Sentencing Guidelines that can be given retroactive effect. The September 16, 1992, revision included the Commission's Amendment 433 among the amendments to the Guidelines that may be applied retroactively. As we explained in our brief in opposition

(at 10), Amendment 433 modifies the career offender Guidelines, §§ 4B1.1 and 4B1.2, under which petitioner was sentenced, by providing that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." United States Sentencing Comm'n, Guidelines Manual App. C253, amend. 433 (Nov. 1991). The Commission stated that the revision to Sentencing Guidelines § 1B1.10(d) (Policy Statement) would take effect on November 1, 1992. 57 Fed. Reg. at 42,804. Under 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10(a), a district court may reduce a defendant's term of imprisonment if the defendant was sentenced within a Sentencing Guidelines range that subsequently has been lowered and if the Commission has directed that the change be made retroactive. Accordingly, as of November 1, 1992, petitioner will be able to apply to the district court for resentencing to a sentence calculated on the basis of Amendment 433, i.e., without having his possession of a firearm treated as a "crime of violence" under the career offender Guideline. For this reason, as well, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1992

Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Westchester County Airport, White Plains, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Westchester County Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before October 16, 1992.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Mr. Philip Brito, Manager New York Airports District Office, 181 South Franklin Avenue, room 305, Valley Stream, New York, 11581.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Eric B. Langeloh, Commissioner of Transportation of the County of Westchester, New York, at the following address: Department of Transportation, 112 East Post Road, White Plains, New York 10601.

Air carriers and foreign air carriers may submit copies of written comments previously provided to Westchester County under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Philip Brito, Manager of the New York Airports District Office, 181 South Franklin Avenue, room 305, Valley stream, New York, 11581, Tel. (718) 553–18182. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Westchester County Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On August 7, 1992, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Westchester County Department of Transportation was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than November 5, 1992.

The following is a brief overview of the application.

Level of the proposed PFC: $3.00.

Proposed charge effective date: October 1, 1992.

Proposed charge expiration date: September 30, 2023.

Total estimated PFC revenue: $29,483,000.

Brief description of proposed projects:

—Construct Crash Fire Rescue Training Facility

—Construct Airport Peripheral Safety Road

—Construct Parallel Taxiway System

—Construct Heated Storage Facility (Phase I)

—Construct General Aviation Infrastructure

—Acquire land for Airport Approach Protection Zone

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Charter Operators.

Any person may inspect the application in person at the FAA office listed above under "FOR FURTHER INFORMATION CONTACT" and at the FAA regional Airports office located at: Fitzgerald Federal Building, John F. Kennedy International Airport, Jamaica, New York, 11430.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Westchester County Airport.

Issued in Jamaica, New York State on August 27, 1992.

Louis P. DeRosa,

Manager, Airports Division, Eastern Region.

[FR Doc. 92–22197 Filed 9–15–92; 8:45 am]

BILLING CODE 4910–13–M

UNITED STATES SENTENCING COMMISSION

Revisions to the Sentencing Guidelines for the United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final action regarding amendments to sentencing guidelines and policy statements effective November 1, 1992.

SUMMARY: The Sentencing Commission hereby gives notice of several actions taken pursuant to its authority under Section 217(a) of the Comprehensive Crime Control Act of 1984 (28 U.S.C. 994 (a) and (p)). The Commission has reviewed amendments submitted to Congress on April 30, 1992, that may result in a lower guideline range and has designated one such amendment for inclusion in policy statement § 1B1.10 (Retroactivity of Amended Guideline Range). An earlier commentary amendment, (effective November 1, 1991), which the present amendment ratifies, was also designated for inclusion in § 1B1.10. In addition, the Commission has made a number of editorial, clarifying, and conforming amendments to the Guidelines Manual.

DATES: The Commission has specified an effective date of November 1, 1992, for these actions.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Officer, Telephone: (202) 626–8500.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the U.S. Government. The Commission is empowered by 28 U.S.C. 994(a) to promulgate sentencing guidelines and policy statements for Federal sentencing courts. Sections 994 (o) and (p) of Title 28, United States Code, further direct the Commission to periodically review and revise guidelines and policy statements previously promulgated, and require that guideline amendments be submitted to Congress for review. Absent action of the Congress to the contrary, guideline amendments become effective following 180 days of Congressional review on the date specified by the Commission (i.e., November 1, 1992). Unlike new guidelines and amendments thereto issued pursuant to 28 U.S.C. 994 (a) and (p), sentencing policy statements, commentary, and amendments thereto promulgated by the Commission are not required to be submitted to Congress for 180 days' review prior to their taking effect.

In connection with its ongoing review of the Guidelines Manual, the Commission continues to welcome comment on any aspect of the sentencing guidelines, policy statements, and official commentary. Comments should be sent to: The United States Sentencing Commission, 1331 Pennsylvania Avenue, NW., suite 1400, Washington, DC 20004, Attn: Public Information Officer. Effective November 16, 1992, comments should be sent to: The United States Sentencing Commission, One Columbus Circle, NE., suite 2–500, Washington, DC 20002–8002, Attn: Public Information Officer.

Authority: Section 227(a) of the Comprehensive Crime Control Act of 1984 (28 U.S.C. 994(a)).

William W. Wilkins, Jr.,

Chairman.

Additional Revisions to the Guidelines Manual

(1) Section 1B1.10(d) is amended by deleting "and 380" and inserting in lieu thereof "380, 433, and 461".

This amendment expands the listing in subsection (d) to implement the directive in 28 U.S.C. 994(u) in respect to guideline amendments that may be considered for retroactive application.

(2) Section 1B1.11 (Policy Statement) is amended in subsection (b)(1) by inserting "of conviction" immediately following "offense".

The commentary to § 1B1.11 captioned "Background" is amended in the first sentence by inserting "and policy statements" immediately following "guidelines".

This amendment clarifies the operation of this section.

(3) The commentary to § 2D1.1 captioned "Application Notes," as amended, is further amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" by inserting the following additional entries:

"1 gm of Aminorex = 100 gm of marihuana
1 gm of Methcathinone = 380 gm of marihuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting an asterisk immediately following each of the following subdivision captions: "Schedule I or II Opiates", "Cocaine and Other Schedule I or II Stimulants (and their immediate precursors)", and "LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)"; and by inserting the following additional sentence at the end of each of the above noted subdivisions:

"'*Provided*, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.".

The Commentary to § 2D1.1 captioned "Application Notes," as amended is further amended by inserting the following additional note:

"15. Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 CFR 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 CFR 1308.13–15 is the appropriate classification.".

This amendment adds equivalencies for two controlled substances to make the Drug Equivalency Tables more comprehensive, adds notes to the Drug Equivalency Tables to make clear the interaction between the minimum offense level for certain types of controlled substances in the Drug Quantity Table and the instructions for determining a combined offense level in a case with multiple controlled substances, and clarifies the treatment of certain pharmaceutical preparations that are classified as Schedule III, IV, or V substances under 21 CFR 1308.13–15.

(4) The commentary to § 2F1.1 captioned "Application Notes" is amended in Note 7 in the first paragraph by inserting the following additional sentence as the second sentence:

"As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred.".

The Commentary to § 2F1.1 captioned "Application Notes" is amended in Note 7(b) by deleting:

"In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan.",

and inserting in lieu thereof:

"In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.".

This amendment clarifies that interest is not included in the determination of loss. In addition, it clarifies that in fraudulent loan application cases, as in other types of fraud, if the intended loss is greater than the actual loss, the intended loss is used. Finally, it makes an editorial improvement in this commentary by deleting an unnecessary phrase.

(5) The Commentary to § 2K1.3 captioned "Application Notes" is amended by inserting the following additional note:

"11. As used in subsections (b)(3) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.".

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 15 by deleting "or (a)(5)" and inserting in lieu thereof "(a)(4)(B), or (a)(6)".

The Commentary to 2K2.1 captioned "Application Notes" is amended by inserting the following additional note:

"18. As used in subsections (b)(5) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.".

This amendment clarifies the meaning of the terms "another felony offense" and "another offense," and corrects a clerical error.

(6) The Commentary to § 3C1.1 captioned "Application Notes" is amended by inserting the following additional note:

"7. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.".

The Commentary to § 3C1.2 captioned "Application Notes," as amended, is further amended by renumbering Note 5 as Note 6 and by inserting the following additional note:

"5. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.".

This amendment clarifies the scope of the conduct for which the defendant is accountable under §§ 3C1.1 and 3C1.2.

(7) The Commentary to § 4A1.2 captioned "Application Notes" is

amended in Note 8 by deleting the last sentence as follows:

"If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct or the defendant's receipt of a substantial portion of income from criminal livelihood, the court may consider this information in determining whether to depart and sentence above the applicable guideline range.".

and by inserting in lieu thereof:

"If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under § 4A1.3 (Adequacy of Criminal History Category).".

This amendment clarifies that dissimilar, serious prior offenses outside the applicable time period may be considered in determining whether an upward departure is warranted under § 4A1.3. The amendment provides additional Commission guidance on an issue that has produced conflicting decisions among the courts of appeals. Compare, e.g., *United States* v. *Leake*, 908 F.2d 550, 554 (9th Cir. 1990) (upward departure impermissible for remote prior convictions dissimilar to instant offense) and *United States* v. *Samuels*, 938 F.2d 210, 215 (D.C. Cir. 1991) (suggesting the same) with *United States* v. *Williams*, 910 F.2d 1574, 1579 (7th Cir. 1990), rev'd on other grounds, 112 S. Ct. 1112 (1992) (although older prior crimes dissimilar to instant offense, upward departure permissible if convictions are reliable information of increased recidivism risk) and *United States* v. *Russell*, 905 F.2d 1439, 1444 (10th Cir. 1990) (same).

(8) The Commentary to § 7B1.1 captioned "Application Notes" is amended by deleting Notes 2 and 3 as follows:

"2. 'Crime of violence' has the same meaning as set forth in § 4B1.2(1), and includes any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

A crime of violence includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension or credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the violation charged involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another. A crime of violence also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

3. 'Controlled substance offense' includes any offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with the intent to manufacture, import, export, distribute, or dispense. A controlled substance offense also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

and by inserting in lieu thereof:

"2. 'Crime of violence' is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). See § 4B1.2(1) and Application Notes 1 and 2 of the Commentary to § 4B1.2.

3. 'Controlled substance offense' is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). See § 4B1.2(2) and Application Note 1 of the Commentary to § 4B1.2.".

This amendment clarifies the Commission's intent that the terms "crime of violence" and "controlled substance offense" in § 7B1.1 have the same meaning as these terms have in § 4B1.2.

In addition, the Commission has updated the "Historical Notes" following the amended guideline sections, and has made a number of additional minor conforming and editorial revisions to improve the internal consistency and appearance of the Manual.

[FR Doc. 92-22332 Filed 9-15-92 8:45 am]
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DISTRIBUTED

OCT 8 1992

NO. 91-8685

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Reply

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HERBERT JAY STEVENS, III
Federal Public Defender
Middle District of Florida

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 91-8685

TERRY LYNN STINSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO THE SUPPLEMENTAL BRIEF FOR THE UNITED STATES

The United States filed a supplemental brief advising the Court of the action of the United States Sentencing Commission, notice of which was published in the Federal Register on September 16, 1992, by which the prior amendment to the commentary to the definition of career offender (which prior amendment stated that the crime of possession of a firearm by a felon was not a "crime of violence") would be made retroactive under Sentencing Guideline § 1B1.10(a).

The United States suggests that Petitioner Stinson will now be able to apply to the district court for resentencing based on the amendment, so that his crime of possession of a firearm will no longer be classified as a "crime of violence," and he would not be

resentenced as a career offender. The United States argues that for this reason Stinson's petition for writ of certiorari should be denied.

On the contrary, the amendment making the clarifying definition of "crime of violence" retroactive is a further compelling reason to grant the petition. Under the law of the Eleventh Circuit in Stinson's case, the Eleventh Circuit refuses to apply the Sentencing Commission's interpretation of the definition of "crime of violence." The Eleventh Circuit's refusal was not based on any claimed lack of retroactivity. Hence, the latest amendment to § 1B1.10 will not alter the holding in Stinson's case. Were Stinson (or any other defendant sentenced as a career offender in the Eleventh Circuit on the basis of a possession of a firearm charge as the predicate offense) to apply to the district court for resentencing under 1B1.10, his application would be denied. This result is mandated by the law in Stinson's case.

Respectfully submitted,

H. JAY STEVENS
Federal Public Defender

By: _____
WILLIAM M. KENT
Assistant Federal Public Defender
Florida Bar #0260738
P. O. Box 4998
Jacksonville, FL 32201
(904) 232-3039

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Ronald Henry, Assistant United States Attorney, P. O. Box 600, Jacksonville, FL 32201, by hand, and to The Solicitor General, Department of Justice, Washington, D.C., this October 7, 1992.

Assistant Federal Public Defender

No. 91-8685

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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January 6, 1993

Washington, D.C. • THIEL PRESS • (202) 328-3288

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 18, 1992
CERTIORARI GRANTED NOVEMBER 9, 1992

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 90-6-Cr-J-14

UNITED STATES OF AMERICA, PLAINTIFF

v.

TERRY LYNN STINSON

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1-10-90	1	**INDICTMENT RETURNED AT JACKSONVILLE, FLORIDA**
		* * * *
01-29-90	5	**RECORD OF HEARING: INITIAL APPEARANCE/ARRAIGNMENT. HES** Deft is serving 25-yr State sentence and not entitled to Bond. Deft advised of charges, penalties, special assessment & rights. Deft requested court-appointed counsel and Federal Public Defender appointed. Not guilty plea entered. Deft remanded to custody.
04-11-90	32	**RECORD OF HEARING: CHANGE OF PLEA SHB** Deft placed under oath

DATE	NR	PROCEEDINGS
		and withdrew previously entered plea of not guilty and pled guilty to counts 1,2,3,4,5. Court accepted plea of guilty and ordered a PSI. Psychological Evaluation filed in camera.
04-11-90	34	**NOTICE** of Sentencing on 6-27-90, 11:00 a.m. before the Hon. Susan H. Black (Parties notified)
07-06-90	39	**RECORD OF HEARING: SENTENCING SHB** Deft is adjudged guilty on counts 1 thru 5. Court finds no grounds for guidelines departure. **SENTENCE: Imprisonment as to each of counts 1, 2, 4 & 5 – 365 months. as to count 3 – 5 years to run consecutive to the sentence imposed in counts 1, 2, 4 & 5.** Supervised release of 5 years. special assessment in the amount of $250.00 to be paid immediately. Deft exhibits 1-18 filed in evidence. Deft's exhibits list filed in open Court. Deft is remanded to custody of USM. govt Witnesses: CWO2 Dan Haines; Thomas Sobolewski. Court ordered statement of reasons attached to judgment. Deft advised of right to appeal and to counsel on appeal. Notice concerning appeals from criminal conviction furnished to counsel for deft.
07-06-90	41	**JUDGMENT** Including Sentence Under the Sentencing Reform Act. /s/SHB MR117/1765 (Parties notified)
07-13-90	42	**NOTICE OF APPEAL**, by Deft

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3711

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

TERRY LYNN STINSON,
DEFENDANT-APPELLANT

Appeal from the United States District Court for the
Middle District of Florida at Jacksonville
Susan H. Black, District Judge

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/06/90	Appearance filed for appellant
12/28/90	Brief for appellant filed
10/4/91	Initial opinion rendered
10/25/91	Petition for rehearing filed
3/20/92	Opinion denying rehearing
4/23/92	Order denying rehearing en banc

APPENDIX B

[Filed Jan 10 1990]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 90-6-CR-J-14

UNITED STATES OF AMERICA

v.

TERRY LYNN STINSON

Ct. 1: 18 U.S.C. §2113(d)
(25 yrs/$250,000/both)

Ct. 2: 18 U.S.C. §§922(g), 924(a)(2) and 924(e)
(15 yrs to life/$250,000/both)

Ct. 3: 18 U.S.C. §924(c)
5 yrs min. man. consecutive/
$250,000/both)

Ct. 4: 26 U.S.C. §§5861(d) and 5871
(10 yrs/$250,000/both)

Ct. 5: 18 U.S.C. §2313
(5 yrs/$250,000/both)

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about October 31, 1989, at Jacksonville, in the Middle District of Florida,

TERRY LYNN STINSON

the defendant herein, by force and violence and by intimidation, did knowingly and willfully take from the person and presence of Carole Benson, a Customer Service Representative, Elizabeth Neven, a teller, and Alice McGraw, a teller, about $9,427.00 in money belonging to and in the care, custody, management, and possession of the Sun Bank of Jacksonville, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and TERRY LYNN STINSON, in committing the aforesaid offense, did assault Carole Benson, Elizabeth Neven, and Alice McGraw and did put in jeopardy the lives of said Carole Benson, Elizabeth Neven, and Alice McGraw by means and use of a dangerous weapon, that is, a short-barreled shotgun.

In violation of Title 18, United States Code, Sections 2113(a) and (d).

COUNT TWO

On or about October 31, 1989, at Jacksonville, in the Middle District of Florida,

TERRY LYNN STINSON

the defendant herein, having been previously convicted of crimes punishable by imprisonment for a term exceeding one year, that is:

1. Armed Robbery, convicted in the Circuit Court of Pike County, Mississippi, Case No. 12,255, on or about October 27, 1978;

2. Burglary, convicted in the Circuit Court of Macon County, Illinois, Case No. 77-CF-536, on or about December 3, 1979;

3. Armed Robbery, convicted in the Circuit Court of Macon County, Illinois, Case No. 78-CF-345, on or about March 19, 1980;

4. Simple Assault on a Law Enforcement Officer, convicted in the Circuit Court of Humphreys County, Mississippi, Case No. 2976, on or about February 19, 1982;

5. Attempted Escape by Force or Violence, convicted in the Circuit Court of Humphreys County, Mississippi, Case No. 2976, on or about February 19, 1982; knowingly did possess in and affecting commerce a firearm, that is a New England Arms Company, Inc., 12-gauge single-barreled shotgun with serial number NA127586.

In violation of Title 18, United States Code, Sections 922(g), 924(a)(2) and 924(e).

COUNT THREE

On or about October 31, 1989, at Jacksonville, in the Middle District of Florida,

TERRY LYNN STINSON

the defendant herein, knowingly did use and carry a firearm, that is, a short-barreled shotgun described as a New England Arms Company, Inc., 12-gauge single-barreled shotgun with serial number NA127586 and a barrel length of approximately 11 15/16 inches, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, bank robbery as described in Count One.

In violation of Title 18, United States Code, Section 924(c).

COUNT FOUR

On or about October 31, 1989, at Jacksonville, in the Middle District of Florida,

TERRY LYNN STINSON

the defendant herein, did knowingly possess a firearm, that is, a short-barreled shotgun more particularly described as a New England Arms Company, Inc., 12-gauge single-barreled shotgun with serial number NA127586 and a barrel length of approximately 11 15/16 inches, not registered to him in the National Firearms Registration and Transfer Record.

In violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT FIVE

On or about October 31, 1989, to on or about November 3, 1989, at Jacksonville, in the Middle District of Florida, and elsewhere,

TERRY LYNN STINSON

the defendant herein, did knowingly and willfully transport in interstate commerce a stolen motor vehicle, that is, a 1985 Ford conversion van vehicle identification number 1 FDDE14FHA53748, from Jacksonville, in the State of Florida, to Gulfport in the State of Mississippi, knowing that said motor vehicle was a stolen motor vehicle.

In violation of Title 18, United States Code, Section 2312.

A TRUE BILL

/s/Arthur W. Cross
FOREMAN

ROBERT W. GENZMAN
United States Attorney

/s/ Ronald T. Henry
RONALD T. HENRY
Assistant United States Attorney

/s/ Curtis Fallgatter
CURTIS FALLGATTER, Managing
Assistant United States Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 90-6-Cr-J-14

UNITED STATES OF AMERICA

-vs-

TERRY LYNN STINSON,
Defendant.

Courtroom Number One
10:00 a.m.
April 11, 1990

TRANSCRIPT OF CHANGE OF PLEA PROCEEDINGS
before
THE HONORABLE SUSAN H. BLACK
Chief United States District Judge

APPEARANCES:

For the Government: RONALD T. HENRY, Esquire
Assistant United States Attorney
Post Office Box 600
Jacksonville, Florida 32201

For the Defendant: WILLIAM M. KENT, Esquire
Assistant Federal Public Defender
Post Office Box 4998
Jacksonville, Florida 32201

Also Present: TERRY LYNN STINSON,
Defendant

Court Reporter: EVELYN G. ALDERMAN
Post Office Box 244
Jacksonville, Florida 32201

Proceedings reported by mechanical stenography; transcript prepared by computer.

* * *

[13] THE COURT: At this time I'm going to ask the government to tell me what they would expect to prove if the case were to go to trial. I will ask you if you admit to the truth of the report, and then I'm going to go through the elements of each offense and ask you whether or not you admit to those elements.

MR. HENRY: Your Honor, if this case were to go to trial, the United States is prepared to prove the following facts beyond a reasonable doubt. We have prepared a factual basis and have attached it to the [14] document that we filed with the Court.

On October 31, 1989, at approximately 12:15 p.m., Terry Lynn Stinson, the defendant, entered the Sun Bank of Jacksonville located at 344 Monument Road, Jacksonville, Florida. The defendant approached Carole Benson, a customer service representative who was seated at her desk. The defendant stated, "Give me the money or I'll throw this in your lap. Hang up the phone and give me the money now." The object which the defendant threatened to throw was later determined to be an olive-

green colored inert grenade. Ms. Benson and the defendant walked to the teller window of teller Alice McGraw. Ms. Benson told Ms. McGraw to give the defendant the money before calling out to teller Elizabeth Neven who was working the drive-thru teller window. At that point in time Ms. Benson noticed that the defendant was holding a sawed-off shotgun with a black barrel and a wood stock. The defendant pointed the shotgun at Ms. Benson while standing beside her. The defendant produced a black plastic trash bag from inside his clothing, placing the trash bag on the teller counter. Both Alice McGraw and Elizabeth Neven took money from their teller windows and placed it into the black plastic bag. The defendant ordered Ms. Benson to get behind the gate and Ms. Benson complied.

[15] As the defendant was walking out the door, he ordered the women to hit the floor at which time the defendant threw the inert grenade into the bank on the floor. The defendant then exited the bank.

The Jacksonville Sheriff's Office and the Federal Bureau of Investigation investigated the robbery. An auditor for Sun Bank determined that $9,427.00 was stolen in the robbery. Sun Bank of Jacksonville is a bank whose deposits are insured by the Federal Deposit Insurance Corporation. The bank's Certificate of Insurance is on file with the Federal Deposit Insurance Corporation in Washington, D.C.

The defendant was arrested on November 3rd, 1989, in Gulfport, Mississippi. Prior to leaving Jacksonville, the defendant had at gunpoint taken a 1985 Ford conversion van with Vehicle Identification Number 1FDDE14FHA53748 from the custody of Mr. Willie Gene Dorminey, a salesman for one of the Ford dealerships in Jacksonville. The 1985 Ford conversion van

was recovered in Gulfport, Mississippi. The defendant did not have permission of Mr. Dorminey or any other representative of the Ford dealership to take the conversion van to Gulfport, Mississippi.

After the defendant's arrest on November 3, 1989, agents of the Federal Bureau of Investigation and deputies [16] with the Harrison County Sheriff's Office in Gulfport, Mississippi, conducted a search of the defendant and the conversion van. Over $1,600 was found on the defendant's person. Over $5,000 was recovered from the trunk inside the conversion van.

Bait bills, that is currency whose serial numbers were recorded by Sun Bank prior to the robbery, were discovered in the money found in the conversion van. The sawed-off shotgun was also discovered in the conversion van.

Subsequent investigation determined that the defendant had purchased a New England Arms Company, Inc. 12-gauge, single-barreled shotgun with Serial Number NA127586, from K-Mart on Atlantic Boulevard in Jacksonville, Florida. That shotgun was the sawed-off shotgun recovered from the conversion van. The defendant had converted the shotgun by cutting off the barrel and stock so that the barrel length of the above described shotgun was approximately 11 and 15/16th inches with an overall length of less than 26 inches.

The New England Arms Company, Inc. shotgun which was purchased by the defendant in Jacksonville, Florida, had been manufactured outside the state of Florida and therefore had moved in interstate commerce prior to the defendant's possessing the shotgun in Florida.

[17] A subsequent check of the defendant's criminal record revealed that the defendant was a convicted felon, having been convicted of several felonies, including an armed robbery conviction from the Circuit Court of

Macon County, Illinois, Case No. 78-CF-345, on or about March 19, 1980. Moreover, a search conducted by the custodian of records with the Bureau of Alcohol, Tobacco and Firearms revealed that the above-described short-barrel shotgun which the defendant possessed in Florida was not registered to the defendant in the National Firearms Registration and Transfer Record.

THE COURT: Mr. Stinson, do you admit to the truth of the report? Is the report accurate the government has just given me?

THE DEFENDANT: Yes.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 90-6-Cr-J-14

UNITED STATES OF AMERICA

vs.

TERRY LYNN STINSON,

Defendant.

Jacksonville, Florida
July 6, 1990
Courtroom Number Two

TRANSCRIPT OF SENTENCING
before
THE HONORABLE SUSAN H. BLACK
United States District Court

APPEARANCES:

For the Government: RONALD T. HENRY, Esquire
Assistant United States Attorney
409 Post Office Building
Jacksonville, Florida 32202

For the Defendant: WILLIAM M. KENT, Esquire
Assistant Federal Public Defender
Post Office Box 4998
Jacksonville, Florida 32201

Court Reporter: EVELYN G. ALDERMAN
Post Office Box 244
Jacksonville, Florida 32202

Proceedings recorded by mechanical stenography; transcript produced by computer.

[2] PROCEEDINGS

July 6, 1990 10:00 a.m.

-o0o-

THE CLERK: Case No. 90-6-Cr-J-14, United States of America versus Terry Lynn Stinson.
Counsel for the Government, Ronald T. Henry.
Counsel for the defendant, William M. Kent.
Please come forward.

MR. HENRY: Good morning, Your Honor.

THE COURT: Good morning.

MR. KENT: Good morning, Judge.

THE COURT: This case was previously set for sentencing and at that time counsel for the defendant indicated they had additional objections that were technical in nature, not factual. The Court recessed the sentencing so that those could be placed in the addendum to the Presentence Investigation Report, and so that the Government would have an opportunity to respond and the Court would have an opportunity to review those objections outside the immediacy of sentencing; therefore, the case was continued.

At this time the Court has before it an addendum to the Presentence Investigation Report which sets out objections to the report, by the Government and also by the Defendant.

Mr. Kent, have you had an opportunity to fully read and review the report, and to discuss it with your client?

[3] MR. KENT: Yes, ma'am.

THE COURT: And Mr. Stinson, have you had enough time to read and review the report, and discuss it with Mr. Kent or anyone else you may wish to?

DEFENDANT STINSON: Yes.

THE COURT: In the addendum to the report the Probation Officer certifies that the Presentence Report, including any revisions thereof, has been disclosed to the defendant, his attorney and counsel for the Government, and that the contents of the addendum have been communicated to counsel, and the addendum fairly states that any objections made by counsel have been resolved.

Is that accurate, Mr. Kent?

MR. KENT: Yes, ma'am, it is.

THE COURT: Is that accurate, Mr. Henry?

MR. HENRY: Yes, Your Honor.

THE COURT: The Court, then, will approve the addendum, objection by objection, and address each objection, making the appropriate factual rulings.

The Government's objection on Page 1, Paragraph 3 – excuse me, Page 3, Paragraph 14, and Page 5, Paragraph 23, in reference to the bank robbery offense, the United States' position is that the defendant impeded or obstructed justice by planting or leaving bombs in more than one location.

The Government cites §3E1.1 of the Guidelines, which [4] states,

"If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of

justice during the investigation or prosecution of the instant offense, increase the offense level from Chapter 2 by two levels."

The United States claims to have evidence to demonstrate that the defendant left bombs not only in the pickup truck at Regency Lake apartment complex, but also in the McDonald's Restaurant near the intersection of University and Beach Boulevards.

The Government believes that the bomb placed at McDonald's was an attempt to divert the police's attention from the Regency Square area where the bank robbery and the unlawful confinement took place.

The Government further notes that a bomb threat to University Hospital was phoned in to police just before the Sun Bank was robbed.

It is the Government's position that the base offense level for the bank robbery offense should be increased to reflect an adjustment for obstruction of justice."

The Probation Officer's position was that an adjustment for obstruction of justice would not be warranted in that the obstruction must take place during the investigation or prosecution of the instant offense, and that the defendant [5] made the alleged bomb threats, and the threats occurred during the course of the offense prior to the initiation of any investigation and, therefore, it would not constitute obstruction of justice.

Mr. Kent, I would give counsel an opportunity to further elaborate on that objection, since the Court has read, really, the Probation Officer's version of what, I'm sure is your objection.

MR. KENT: Yes, Judge, I accept the Probation Officer's position and have nothing further to add.

THE COURT: Mr. Henry.

MR. HENRY: Your Honor, while we realize that this would not have an impact on the sentencing guide-

lines since Mr. Stinson is a career offender, we believe that were he to be sentenced under the ordinary sentencing guidelines that the obstruction of justice would apply because the police were diverted from the investigation of the robbery at Sun Bank by the fact that there were two bombs placed, and a bomb threat to the University Hospital and, therefore, that impacted the police ability and the F.B.I.'s ability to investigation the full impact of the bank robbery.

THE COURT: Did any of these events happen after the bank robbery?

MR. HENRY: The first bomb that we'll demonstrate, was set at about 9:30 in the morning, approximately three [6] hours before the bank was robbed.

The second bomb was found in the pickup truck which was used in the bank robbery shortly after, I would say it would have to be probably within an hour after the bank robbery itself. The bomb threat itself came in just prior to the bank robbery.

THE COURT: Do you have anything further, Mr. –

MR. HENRY: We recognize that it may be a moot point because it will not impact the scoring, but we wanted the record to be clear as to his entire conduct.

THE COURT: Do you have anything further you would like to present concerning the Government's position?

MR. HENRY: Not as far as this legal argument is concerned. I do have evidence to demonstrate our belief that Mr. Stinson is the source of the bomb that was in the McDonald's Restaurant.

THE COURT: If you would proceed.

And just to make sure that I'm correct, when you're referring to the first bomb, you're referring to the McDonald's Restaurant?

MR. HENRY: Yes, Your Honor.

THE COURT: And when you're referring to the second bomb, you're referring to the Regency Lake Apartments?

MR. HENRY: Yes, Your Honor.

[7] Your Honor, may it please the Court, the United States would call Chief Warrant Officer Dan Hains.

MR. KENT: Judge, we would be willing to stipulate, if it's appropriate, that Mr. Stinson was the source of this bomb, or however it's described.

THE COURT: Is that correct, Mr. Stinson?

DEFENDANT STINSON: Yes.

THE COURT: In light of that stipulation, the Government may call the witness but just for very brief testimony, so the Court will have a full appreciation of the facts.

MR. HENRY: Thank you, Your Honor.

Chief Hains.

THE COURT: Sir, if you would come forward. The Clerk is going to administer the oath, and because your testimony will be very brief you may just stand next to the Government.

THE CLERK: Raise your right hand.

(The witness is sworn by the Clerk.)

THE CLERK: Thank you. Please state your name.

THE WITNESS: Dan S. Hains.

THE CLERK: Spell your last name, please.

THE WITNESS: H-a-i-n-s.

DAN S. HAINS,

called as a witness by the Government, being first produced [8] and duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HENRY:

Q. You're a Chief Warrant Officer in the United States Navy?

A. Correct.

Q. And what is your particular job assignment, function, with the Navy?

A. Right now I'm the Officer in Charge of the Explosive Ordnance Disposal Detachment, Mayport.

Q. Were you personally assigned to investigate or to disarm a bomb at the McDonald's Restaurant at University and Beach Boulevards, Jacksonville, Florida?

A. We received a call from the police department requesting our assistance. We got permission from the Commanding Officer of the base to respond to a civil incident and showed up at McDonald's to take care of a suspected item located in the bathroom at McDonald's.

Q. And you personally observed the suspected destructive device yourself, is that correct?

A. Yes, I did.

Q. Have you also observed items which were seized from Mr. Stinson after his arrest?

A. Yes, I did.

Q. And based upon that, do you have an opinion as to the [9] source of that bomb in the McDonald's Restaurant being the same person that had the items that were seized from Mr. Stinson; is that correct?

A. Yes. Numerous items that were shown to me by the F.B.I. were also used in the bomb we disarmed at McDonald's.

Q. And did you also see a destructive device, or, I guess, just for layman's purposes I'll call it a bomb, that was in this white Chevy pickup truck at Regency Lakes?

A. Yes, I did.

Q. And you had the opportunity to observe it and to inspect it closely?

A. Yes.

Q. And did you come to that same conclusion as to the person who made that bomb being the same person who owned the items that were ultimately seized from Mr. Stinson?

A. Yes. There were components in there that were the same as the ones that were shown to me again by the F.B.I., and the same as what was used at McDonald's.

Q. Can you tell the Judge in your expert opinion as a person dealing in explosive ordnance devices – how long have you been doing this? First let me ask you that.

A. I first started doing it back in January of 1977 upon graduation from Explosive Ordnance Disposal School in Indian Head, Maryland.

Q. And has that been your primary assignment since that [10] time?

A. Yes. There have been no breaks.

Q. Could you tell the Judge what type of thought and care it would take to construct the two devices that you saw.

A. Well, just from the appearance, everything was there that was necessary to create an operational explosive device. We had a power source, we had – which is a 9 volt battery. We had a container to hold the explosive device, which was rifle powder. We had wires running inside hooked up to what appears to be, or what is in fact model rocket igniters. We had a switch on the top that was constructed out of wooden clothespins.

Based on the observation of what we seen and what we've dealt with and trained on in the past, we took it to be a live explosive device and proceeded to run what we call a J-rod attack, a water cannon attack on it, that has a

ninety-eight percent chance of defeating the item without it going off. In this case we defeated the item.

Q. Is this something that – would you characterize it as unsophisticated, sophisticated or moderately sophisticated, if you can characterize it at all, in terms of the construction and the design?

A. It was a basic explosive device. He had a circuit with explosives and a way to initiate it, from what we could see.

With an IED, or an improvised explosive device it's [11] hard to say, you can't see inside the package to see if he had a secondary initiation device in there. The outside was a very basic design.

Q. Does it take any thought or care in constructing?

A. Yeah, I would – yes, I would say it does take quite a lot of care, a lot of thought in constructing.

Q. Both of them, or just one of them?

A. I'd say both of them.

Q. Thank you.

MR. HENRY: No further questions.

THE COURT: Mr. Kent.

CROSS EXAMINATION

BY MR. KENT:

Q. Just one question, Officer.

Was anyone injured in defusing this device?

A. Nobody was injured. The defusing did a little bit of damage to McDonald's, but not very much.

MR. KENT: Thank you, sir.

THE COURT: Thank you.

MR. HENRY: Your Honor, as far as the actual devices themselves, Chief Warrant Officer Hains is my only witness.

I do have one other witness to elaborate on what will be our ultimate argument, and which has been our argument all along, that Mr. Stinson should be sentenced to [12] life imprisonment.

THE COURT: Does that relate to this first objection?

MR. HENRY: No.

THE COURT: Then if we could defer that until later so that we will have an orderly process.

MR. HENRY: Yes.

THE COURT: The objective, the Court has found in order to proceed in the most reasoned way, is to go through the objections, obtain a total offense level based on the Court's rulings, and then within that offense level, or any argument for departure, the Court will address that in aggravation and mitigation.

Is there anything further, Mr. Kent?

MR. KENT: No, ma'am.

THE COURT: The Court would find from the testimony of Chief Hains, from the evidence it has heard, and from the defendant's admission, that a bomb was discovered in McDonald's Restaurant three hours before the robbery; a second bomb an hour after the robbery at the Regency Lakes apartment complex, and there was a threat before the robbery. The defendant was responsible for this conduct.

It is the Probation Officer's position and the defendand't position that the obstruction was not during the [13] investigation or prosecution of the instant offense.

The Court would find that if all of the conduct had occurred prior to the robbery the decision would be more difficult. In this case, though, at least one of the bombs, the second bomb at the Regency Lake Apartments, was an hour after the robbery; and the Court would find that

it did impede the investigation of the instant offense; therefore, the Court would sustain the Government's objection.

Those findings, first of all, would be reflected in the Presentence Investigation Report, which would be Paragraph 14; and then on Paragraph 23, the Court would increase by two levels the adjustment for obstruction of justice, which would make the total 39.

The defendant has several objections. The first objection is to the Probation Officer denying the defendant an adjustment for acceptance of responsibility.

Defense counsel indicated that the defendant admitted his involvement in the offense and should be granted a two level reduction in offense level pursuant to 3E1.1 of the guidelines. The Probation Officer is of the opinion that the defendant does not clearly demonstrate a recognition and affirmative acceptance of personal responsibility.

Pursuant to 3E1.1 of the guidelines, there are a number of factors to consider in determining whether the defendant qualifies for this provision. One of these considerations [14] is voluntary termination or withdrawal from criminal conduct or association.

After the defendant committed the bank robbery, the defendant fled the Jacksonville area and traveled to Orlando, Florida, in a stolen van. The following day Mr. Stinson continued his pattern of criminal behavior by traveling in interstate commerce to the state of Mississippi in the stolen vehicle. The defendant's continuation of committing illegal acts subsequent to the bank robbery does not demonstrate voluntary termination from the criminal conduct.

Another consideration in determining whether a defendant qualifies for this provision is voluntary sur-

render to authorities promptly after the commission of the offense. As the Presentence Report reflects, Mr. Stinson did not surrender to law enforcement authorities, but instead was apprehended approximately five days after the bank robbery in Gulfport, Mississippi. Upon arrest, the defendant was attempting to obtain a taxi to flee the motel where he was staying.

Finally, the timeliness of the defendant's conduct in manifesting acceptance of responsibility must be considered. The defendant did not acknowledge his guilt in this case until the eve of trial. It is felt by the Probation Office that the defendant entered a guilty plea only for expediency [15] and it was not a significant display of remorse.

Mr. Kent, if you wish to make any argument concerning that point.

MR. KENT: Judge, has the Court had the benefit of my letter to the Probation Office in which I detailed the objections. I don't want to repeat if the Court has already read that letter.

THE COURT: No. If you would repeat.

MR. KENT: The highlights, Judge, of our position are that, first, we would point out that the Probation Office in the original Presentence Report made a determination that Mr. Stinson had affirmatively accepted responsibility for the offense and accorded Mr. Stinson acceptance of responsibility status and recommended the two level downward adjustment.

Then the Goverment objected to the accord of acceptance of responsibility and in the first addendum to the Presentence Report, the Probation Office changed its position.

Now, in the Government's objection I would, it's my position that the Goverment did not bring forth any new

facts or any new legal theory, but simply repeated the known facts.

The Probation Office in the original Presentence Report had taken the, I believe, mistaken position that acceptance [16] of responsibility did not affect the total offense level after the adjustment was made for the career offender status. That is, the way they worked the original Presentence Report was they gave him acceptance of responsibility, took two levels off of the underlying offense base offense level, then made the career offender adjustment, bringing him to level 37; then they made no further adjustment for acceptance of responsibility. Now, this error was called to the Probation Officer's attention, so in the addendum this was corrected.

It was pointed out that if the Probation Office had not changed its position and it continued to give acceptance of responsibility credit, the adjustment would be made after the career offender adjustment is made. In other words, the way the Probation Office had originally done it, it was a moot point because it didn't affect the bottom line. But they recognized later that it would affect the bottom line and then changed their position on whether he should receive acceptance of responsibility.

Now, the original addendum to the Presentence Report noted just two factors for that change. Those were that Mr. Stinson did not enter a guilty plea until the eve of the scheduled trial, and second, that Mr. Stinson had never given a statement to law enforcement officers, but had given a statement to the Probation Officer admitting his [17] responsibility.

As to the second point, I pointed out to Probation, in response to the addendum, that to the best of our knowledge Mr. Stinson had never been asked for a statement and that there is no law enforcement authority who really wanted any statement from Mr. Stinson.

And we pointed out also in the meeting of the parties, in response to the addendum, that the F.B.I. 302, which I later intend to admit as an exhibit, on the arrest of Mr. Stinson out in Gulfport, Mississippi, indicated that when Mr. Stinson was taken into custody he was advised of his rights, and he said that he wanted to speak to a lawyer. Now, this was after Mr. Stinson had voluntarily signed consent to search forms for the van and for the motel room. The van was searched and the balance of the robbery proceeds were found in the van.

After these consents to search were signed, Mr. Stinson was advised of his rights in addition to the consent to search rights, and said he wanted to speak to a lawyer, so the F.B.I., as is their practice and as is correct, did not question Mr. Stinson any further. Since then, to the best of our knowledge, no law enforcement authority has ever asked to speak to Mr. Stinson.

Now – and since then, though, Judge, Mr. Stinson has volunteered to give information to the Government not only, [18] of course, about this offense, again which the Government doesn't need any additional information, but about other crimes that Mr. Stinson is aware of from his past incarceration.

Now, it's true that the plea, as to the other point Probation raised, was not until the eve of trial. But it is also true that Mr. Stinson had never denied committing the offenses, and that, as the Court will remember, we filed proposed voir dire questions and proposed jury instructions for the defendant. The position taken both in the voir dire and the jury instructions was quite straightforward, that Mr. Stinson admitted he had done these offenses, but he was going to raise as a possible defense a legal theory of justification, that he had done these offenses for a reason, and it's the same reason which

we're going to consistently present here this morning in mitigation. But the legal theory was justification as a defense, not a denial of commission of the offenses. That again was in the voir dire questions where we admitted to the jury that Mr. Stinson admits that he had committed these offenses, and also in the proposed jury instruction where we sought an instruction on justification as a legal defense.

Also, Mr. Stinson just pointed out to me that he agreed to waive extradition out in Gulfport, Mississippi. He did everything he could to cooperate with the authorities at the [19] time of his arrest.

Now, the Government raised some specific objections, though, and they went point by point through the commentary on acceptance of responsibility, and I have just a very brief response to each of those.

Voluntary termination of criminal conduct. The Government points out or takes the position that there was no voluntary termination of criminal conduct. I would ask the Court to look at a broader scope, starting with the time Mr. Stinson escaped from the Leflore County jail in Mississippi where he was a trusty and his escape consisted of walking away. In fact, his escape wasn't detected until almost a day later, or several hours later because of his trusty status. Mr. Stinson walked away from the jail, he didn't steal a vehicle to flee, he walked away and hitchhiked away from the Leflore County jail.

He went to Tallahassee, Florida, this was in January of 1988, where he got a job with a labor pool. He worked well in the labor pool, was hired by a construction company full time. That construction company went bankrupt, he was hired by another construction company that had worked with that one. He worked consistently,

Judge, pretty much six days a week the entire time that he was on this escape status.

His employers were interviewed at both construction companies and they both reported that he was a good [20] employee, that he stayed out of trouble, that the construction crews were a pretty rowdy bunch and often got into scrapes but Mr. Stinson stayed away from that kind of stuff.

He did not conceal any new offenses while he was on this escape status for almost a year. He was stopped for a traffic violation where he had no valid driver's license. He gave his correct name. About a week later then he was, after that traffic stop and this is after almost a year out on escape status where he was working six days a week supporting himself and not getting into any trouble, he was laid off from his job.

When he was laid off he went home and found out from his roommate that the police had been by with a warrant for his arrest. He had given his true name at the time of the traffic stop and he jumped to the conclusion that this was a warrant for arrest for his escape, when in fact it was a warrant for arrest for not responding to the no valid driver's license. He panicked and went on this crime spree that he admits to.

Judge, other than this, if we look at it in the broader scope, there was a voluntary termination of criminal conduct for a period of a year, almost a year, from January to October of 1989.

This bank robbery that was committed, once it was done, [21] which we'll explain his reasons for doing it to the Court later, there wasn't any further criminal conduct; I mean, it was a bank robbery and it was over, there wasn't any continued criminal activity. Now, the Probation Office in the second addendum notes that, well,

continuing to drive the stolen vehicle was a continued crime, but I think that's a somewhat specious argument, there really was no continued criminal conduct.

The second point the Government raised, reflecting on the commentaries, was that he had not made restitution for the crime. Now Mr. Stinson, when he was arrested, signed consents to search and turned over what money he had, which was about $7,400. Approximately $9,400 had been stolen in the bank robbery, the other $2,000 had been spent in the four days that he was off.

He is fully indigent. This man has been in prison since he was, I believe, seventeen years old, other than this escape, and there simply is no way, of course, for him to make restitution.

The third point is admission to authorities, I've already covered that. No one, of course, has asked him to make any statements other than the Probation Officer and he did respond fully and frankly to the Probation Officer.

The fourth point the Government raised was that he did not surrender himself. Well, that's true in a technical [22] sense, but I don't know if the Court is aware, this was – Mr. Stinson was considered armed and dangerous by law enforcement and so great care was given to his capture in Gulfport, Mississippi, once he was located there. I believe the streets were closed off around the motel, or the street in front of the motel, part of the motel was evacuated. Mr. Stinson was aware of this.

The shotgun that was involved in the robbery was in the van and that's where it was found when the van was searched. Shells – the shotgun was not loaded, I don't believe – shells were in the van, it could be loaded. He didn't arm himself and resist this arrest which was obvious, but he walked our and peacefully surrendered.

And as I said before, he cooperated with the authorities from the moment of being taken into custody, on.

And the fifth point, just acceptance of responsibility. He's never denied responsibility for this offense to anyone who has ever asked him about it.

Judge, we would take the position that he has affirmatively, as much as he could have, accepted responsibility for this offense. We believe the Probation Officer was correct in the original Presentence Report in according Mr. Stinson acceptance of responsibility for the offense.

THE COURT: Anything further, Mr. Henry?

[23] MR. HENRY: Yes, Your, if I could respond.

Mr. Kent says that the Government's response in this letter was with known facts known to the Probation Officer. I assert that you know – I can't argue for Mr. Carter – I think Mr. Carter may have overlooked certain facts when he acknowledged acceptance of responsibility, and that's why I pointed out that out of the seven examples that are given by the Sentencing Guidelines Commission we can refute six of them and the seventh doesn't apply.

The first one is voluntary termination from criminal conduct or associations. Mr. Kent, I believe, diverts the Court's attention from that particular example by saying that he didn't continue in criminal conduct or associations. I believe that that statement is incorrect, but it's very true that he did not voluntarily disassociate himself from criminal conduct and terminate or withdraw from his criminal conduct.

He may be indigent, but another one of the examples is voluntary payment of restitution. Nothing has been given back to the victims of the offenses other than what was seized after his arrest.

Voluntary and truthful admission to authorities of involvement in the offense and related conduct. The police officers found themselves in a position of doing what

is right and not talking to a defendant who has asserted his [24] Constitutional right to have an attorney, and then have it used against them at sentencing by saying that he's never been given an opportunity to talk to police officers.

I think what is most telling is the example, voluntary surrender to authorities promptly after commission of the offense. This was four days later. He was trying to flee the motel when officers and agents made his arrest. He had called a cab and he was getting into the cab when the cab was surrounded. And then, of course, the cab driver was an F.B.I. agent who assumed the role of the cab driver.

Voluntary assistance to authorities in recovering the fruits and instrumentalities of the offense. If he's unable to do it, he shouldn't be given credit for acceptance of responsibility.

And the last one, the timeliness of his conduct in manifesting the acceptance of responsibility. Our position all along has been that Mr. Stinson's defense of justification is made up, it's a con. We believe that when the Court knows all of the facts surrounding it, things that we'll bring to the Court's attention, that the Court will agree with us that he has not accepted responsibility for what he has done, he has merely turned it into justification, which is not correct, is not legally correct, and shouldn't be used in his favor.

MR. KENT: Nothing further.

[25] THE COURT: The Court, having heard argument, finds its factual determination, and the Court today, even at this point the defendant has stood before the Court and has admitted to the Court not only the offense but also the first bombing McDonald's, the second at Regency Lake Apartments, and the Court would

find that the defendant has affirmatively accepted responsibility for his conduct pursuant to the criteria set forth in the sentencing guidelines; therefore, Paragraph 38 would be negative 2.

The Court is going to now go through, before going to the next objection, Mr. Kent. to see where we are concerning the numbers, and would ask the Probation Officer to follow along to make sure that there's no question concerning the arithmetic.

Paragraph 23 would be increased by 2 –

Are you with me, Mr. Carter?

PROBATION OFFICER: Yes, ma'am.

THE COURT: – which would make the adjusted offense level 21.

Then the adjusted offense level subtotal under Group 2 would remain the same.

PROBATION OFFICER: Your Honor, is the Court going to increase the offense level in Count Two also?

THE COURT: Correct. Thank you.

That ultimately won't make any difference, will it?

[26] PROBATION OFFICER: No, Your Honor.

THE COURT: Because that would be 13, which would be brought back down, under Paragraph 13 then would be 21, Paragraph 32 would be 13; but the total, the greater adjusted offense level would be 21.

Then Paragraph 35 as it stands would be 1, and the total would be 22, combined adjusted offense level.

Is that accurate, Mr. Carter?

PROBATION OFFICER: That's correct.

THE COURT: Then to the next page, Paragraph 38 would be minus 2, which would bring the total offense level to 20.

Is the math accurate?

MR. KENT: Yes, ma'am, I believe so.

MR. HENRY: Yes, Your Honor.

THE COURT: Then let's go to Objection No. 2, which is page 9, Paragraph 49.

Defense counsel objects to page 9, Paragraph 49, career offender position, wherein the Probation Officer sets forth Count Two, Possession of a Firearm by a Convicted Felon, as the predicate for the career offender determination.

Defense counsel argues that possession of a firearm by a convicted felon is not a crime of violence and should not be used as a predicate offense in determining career offender.

[27] Defense counsel further argues that even if it were a crime of violence, that is possession of a firearm by a convicted felon, Mr. Stinson does not qualify for the enhanced punishment provided for by 18 U.S.C. §924(e), which requires a predicate of three previous convictions for a violent felony or serious drug offense.

In addition, defense counsel contends that the penalty provisions for 18 U.S.C. §922(g), provides under 18 U.S.C. §924(e), that the offender shall be imprisoned for not less than fifteen years. Defense counsel states that nowhere in the statute is there authorization for a penalty of life imprisonment.

The Probation Officer cites 4B1.1 of the guidelines, which states that the defendant is a career offender if

(1) The defendant was at least eighteen years old at the time of the instant offense;

(2) The instant offense of conviction is a felony, that is either a crime of violence or a controlled substance offense; and

(3) The defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

In reference to Subsection (2) above, the Probation Officer utilized Count Two, Possession of a Firearm by a Convicted Felon, as a predicate offense. It is felt that [28] this offense is a crime of violence. Further, the defendant had previously been convicted of crimes of violence on three occasions; therefore, the career offender provision applied.

Count Two carries a maximum penalty of life imprisonment, thus a base level of 37 is appropriate.

Does counsel for the defense have any further argument?

MR. KENT: Yes, ma'am, just to elaborate briefly, I won't belabor this.

These provisions are so technical and so, I think or I find them, complex, that they're hard to follow. But our position is – and we have three essential arguments – the first argument is the predicate offense that the Probation Office is using, possession of a firearm by a convicted felon, that that is not a proper predicate offense under the statute, under the career offender provision of the guidelines.

Our second position is even if it is a proper predicate offense, that – then step two, that as a convicted felon in possession of a firearm Mr. Stinson doesn't qualify for the enhanced life penalty under §924(e), because that enhanced life penalty requires, within §924, three prior violent felonies.

And then our third argument is, well, even if he does have three prior violent felonies for purposes of §924(e), the statute in fact does not provide for a life penalty, but [29] only provides for a fifteen year penalty.

So those are our three positions.

To the first point: Is possession of a firearm by a convicted felon a proper predicate offense for the career

offender provision? Our position is that it is not, and that is because to be a predicate offense under the career offender provisions requires that the offense be a crime of violence. The career offender provision in the guidelines provides the Court with a definition of crime of violence.

Now, we have to know which definition do we use, because the guideline career offender provisions have been amended. They were amended effective November 1, 1989, and a new definition for crime of violence was provided. Our position is that the definition in the previous version of the guidelines is the definition that applies to this offense because this offense, as charged, occurred on October 31 of 1989.

So, we would turn to the definition in the guidelines effective October 31, 1989, to decide what is a crime of violence and that definition says that,

"A crime of violence for purposes of career offender is. . ." –

Bear with me, I have to look at my notes, even I get lost with this and it's my own argument.

". . . as used, is defined in 18 U.S.C. §16."

[30] Now, 18 U.S.C. §16, as the Court is well aware, defines a crime of violence as,

"An offense that has as an element . . ." – and we would emphasize that – ". . . as an element, the use, attempted use, or threatened use of physical force, or

"(2) Any other offense that is a felony in that by its nature . . ." – and we would emphasize that by its nature – ". . . involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Now clearly, possession of a firearm by a convicted felon does not have as an element – it doesn't fit into

the first category – does not have as an element the use or attempted use or threatened use of physical force. So, if it is a crime of violence it has to come in the second category of 18 U.S.C. §16, which is an offense that by its nature involves a substantial risk of force.

Now, the Eleventh Circuit has looked at this definitional problem in *United States v. Cruz*, 805 F.2d 1464, and I have a copy for the Court.

Now here, the question in *Cruz* was not this exact question, in *Cruz* the question was conspiracy to commit a drug trafficking offense, was that a crime of violence. That was the narrow question in *Cruz*. But in *Cruz* there's quite a bit of discussion, the ultimate issue was how do you [31] define this language, "by its nature" and the Government's position in the *Cruz* case was, by its nature you take a case by case approach and you look at the facts and circumstances of the offense, the defendant's particular underlying offense and see was the nature of that crime one which involved force or threatened use of force.

The Eleventh Circuit rejected that approach, and I would submit to the Court that that is the only approach by which the charge of possession of a firearm by a convicted felon could ever be deemed to be a crime involving force or use of force, because only if you looked at the circumstances of the particular offense such as this one where the gun was brandished in an armed bank robbery, were that the circumstances were force was used or threatened, but is the crime by its nature one.

So the Eleventh Circuit rejected that approach and said no, we can't take a case by case looking at the circumstances approach. The bottom line the Court took was that this definition is so ambiguous that we can't understand what it means, and that therefore, this often

invoked but rarely applied rule of lenity has to be applied when we're constructing 18 U.S.C. §16. In applying the rule of lenity in *Cruz* they decided that a drug trafficking conspiracy was not a crime of violence no matter what the circumstances were.

[32]Our position would be similarly here, that of course the statute hasn't been amended, hasn't been clarified, the Eleventh Circuit hasn't changed its position, this definition still applies for pre-November, 1989, offenses, therefore the rule of lenity must be applied and possession of a firearm by a convicted felon is not by its nature a crime of violence.

That's our first position, Judge.

Then our second position is, even if it were a crime of violence, what is the maximum penalty for the predicate offense, because it's that maximum penalty for the predicate offense which establishes the corresponding career offender offense level.

Here the Probation Officer takes the position that the maximum penalty for the possession of a firearm by a convicted felon under 18 U.S.C. §924(e) is life in prison, and therefore the career offender base offense level is level 37.

We dispute that, and our position – well, we dispute that he qualifies for that maximum penalty if that is the maximum. Under §924(e), to qualify for the enhanced penalty the offender has to have three prior violent felonies. Now this term violent felony is a term of art which exists only in §924(e), and is defined in 18 U.S.C. §924. The definition is, or the essential term of the definition which [33]applies here is,

"A violent felony requires use of a firearm."

So, we have to go back and look at Mr. Stinson's prior record, as unfortunate as it is, and determine are

there three violent felonies, three felonies that involve use of a firearm, and we submit that there are not.

First, there was an unarmed burglary, and I think that's clearly not a violent felony for §924 purposes.

Second, there was an aggravated assuault with a firearm. We concede that is a violent felony.

Third, there was an armed robbery. That again, is a violent felony, so that's two predicate violent felonies.

And last, there was a simple assault. Now the simple assault, the facts and circumstances, our position again would be analogous to 18 U.S.C. §16, you should not look at the facts and circumstances, but if you do look at the facts and circumstances, the simple assault in fact did not involve a firearm.

So our position is there were not three prior violent felonies, therefore he does not qualify for the enhancement. If you don't qualify for the enhancement under §924(e), the maximum penalty for the possession of a firearm is ten years; and then we would have to have the corresponding maximum statutory offense level as a career offender for a ten year offense which, I believe, is level 25. I assume [34]the Government's position then would be to use the armed bank robbery as the predicate offense instead.

Then our third position is, well, even if there are three prior violent felonies the maximum statutory penalty under the enhancement of 18 U.S.C. §924(e) is not life, but is only fifteen years.

This is a matter of statutory construction. The statute is, as I think everyone agrees, poorly drafted. It's been amended so many times, and it's never been fully harmonized. §924(a) says that the maximum penalty for a §924 offense is ten years. Then §924(e) says if you have three prior violent felonies you shall be sentenced to

not less than fifteen years. Now, that's the extent of the statutory direction as to penalty. There is no authorization of a life penalty. §924(a) says the maximum penalty is ten years; §924(e) says not less than fifteen.

Now, there has been a decision from another circuit that has held that "not less than fifteen," implies, "or not more than life." and therefore the maximum penalty is life. There is no Eleventh Circuit decision that I'm aware of, though, interpreting this, and it's our position again that this is ambiguous; that actually the statute itself is in conflict, the rule of lenity should apply and the maximum sentence should be no more than fifteen years. And then again, we would apply the corresponding offense level and [35] the career offender position and it would be whatever it is, I believe a level 34.

That is our argument, Judge.

THE COURT: Mr. Henry.

MR. HENRY: Your Honor, I'll try to address Mr. Kent's arguments in the order that he presented them. If I do jump around, I apologize.

Mr. Kent argues that the possession of a firearm by a convicted felon is not a violent offense. We would argue that the *Cruz* case is not applicable to this particular situation because it deals with a subject matter, a drug conspiracy, which is something totally different. We would argue that possession of a firearm by a convicted felon is by its very nature a violent offense.

Now, the only other case that I'm aware of from a Circuit Court of Appeal is *United States v. Williams,* 892 F.2d, 296, at page 304, a Third Circuit, 1989, case. That Court said that how the weapon was used should determine whether or not it's a violent felony in terms of possession of a firearm by a convicted felon.

I argue that this circuit should hold that possession of a firearm by a convicted felon is a violent felony

because the proscription against felons having firearms is because by their very nature the potential for violence exists.

[36] There is some precedent in this circuit as well for that argument. This finding was made in *United States v. Terry Lawan Wright,* which was Case No. 89-228-Cr-J-14.

Mr. Kent's second argument is that even if it is a violent felony, the defendant doesn't qualify because it requires three prior violent felonies. Mr. Kent, I believe, is laboring under the misimpression that the statute has changed the definition of violent felony, but I would ask the Court if the Court would look at 18 U.S.C. §16, that he first cited, and then 18 U.S.C. §924(e)(2)(b). The term violent felony, in the context in which it's written in both cases is the same.

Mr. Kent argued that the term violent felony means that a firearm has to be used in order for a violent felony to exist. That's simply incorrect. §924(e)(2)(b) says that,

"A violent felony means any crime punishable by imprisonment for a term exceeding one year, or . . ." – this is in the conjunctive – ". . . any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult..." – that's in the conjunctive, disjunctive, rather – "...that has as an element the use, attempted use or threatened use of physical force against the person of another."

And then it gives a couple of other types of crime that [37] would qualify.

"Violent felony is an adult act that has the element, the use, the attempted use, the threatened use of physical force, or it can be a juvenile delinquency offense which the Court can consider in determining whether he has a

prior violent felony, but only if there is the threatened use of a firearm, knife or destructive device." That's in the disjunctive.

So the Court can look to when did this crime occur in Mr. Stinson's life and say that it involves the use, attempted use or threatened use of physical force against the person of another.

Mr. Stinson concedes the two prior violent felonies, the armed robbery and the aggravated battery; what he does not concede is a violent felony is the assault on the law enforcement officer. An assault by its very nature, whether a simple assault or aggravated assault, involves the attempted – the use or attempted use or threatened use of physical force against another individual, in this case a correctional officer at the prison.

In fact, in looking at the facts behind this particular case we find that Mr. Stinson used a homemade zip gun in this assault on this law enforcement, this correctional officer. Now, Mr. Kent also argues that the zip gun that was used at the prison was not a firearm. By definition, 18 [38] U.S.C. §921(a)(3), in defining firearms it says,

"The term firearm means any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive."

By its nature a zip gun is designed to expel a bullet. In other words, it shoots a bullet. That's all it is. And whether or not it was capable of firing is not really at issue, but the fact that it was designed and could be converted to that use. So there was a firearm used in that particular case. So even if you accept Mr. Kent's definition, there were firearms used in all three cases; but I believe that the statute does not require that the definition be used.

The last argument Mr. Kent makes is that even if there are three prior violent felonies, the statute does not require a life sentence and that it's not a life felony. I agree with Mr. Kent that there are no Eleventh Circuit decisions to the contrary, but there are at least two other circuits that have found that the maximum term of imprisonment is life.

The first, *United States v. Jackson*, 835 F.2d, 1195, it's a 1987 Seventh Circuit case. Also, *United States v. Gourley*, G-o-u-r-l-e-y, 835 F.2d, 249, it's a Tenth Circuit 1987 case, in which cert. was denied at 486 U.S. 1110. Both [39] of those cases have found that not less than fifteen years implies, and correctly implies, that the maximum sentence that can be imposed is life imprisonment.

Therefore, we argue and we maintain our position that Mr. Stinson has been convicted of three prior violent felonies, and that the maximum term of imprisonment that should be considered in terms of determining the proper sentencing guidelines is life in prison for the possession of a firearm by a convicted felon.

MR. KENT: Judge, there was one thing that I neglected to mention, Mr. Henry did touch on there, though.

Another objection I did have was the career offender provision requires prior crimes of violence as predicates. The Probation Officer has listed three prior crimes of violence. We concede that two of those three, that is the aggravated assault with a firearm in Mississippi, and the armed robbery in Illinois are crimes of violence. But we would, as Mr. Henry points out, dispute the simple assault being a crime of violence, and we just wanted to put that objection on the record.

As to that definition in §924, we believe the burden is on the Government, no matter what definition the Court

follows, whether it follows the disjunctive argument that a firearm is not required in a §924(e) predicate offense or not, still the burden is on the Government to prove the [40] violent felony. We don't think that the Court can simply infer out of thin air that a simple assault under Mississippi law, by its nature or as an element, requires the use of force or threatened force against an individual.

MR. HENRY: Your Honor, I apologize for not having the same legal education as Mr. Kent, but I cannot imagine where I missed the point that an assault was not by its nature a violent act. Even a simple assault involves some sort of violence. He pled to simple assault to a law enforcement officer, which is a felony and a violent felony.

We stand by our position, and I can't imagine that there is any authority in any location, anywhere, that would hold that an assault is not by nature a violent act or a potentially violent act.

THE COURT: First of all, as to Defendant's Objection No. 2, page 9, Paragraph 49, the Court would overrule that objection.

The Court would find, first of all, that the offense of possession of a firearm by a convicted felon is a crime of violence, both by its nature and how the weapon was used in this case. The Court would further find that the maximum penalty for this offense is a term of up to life in prison.

In addition, the Court would find that the simple assault referred to as the third predicate offense in argument by counsel and also by the Probation Officer, is a [41] violent act, and would overrule the objection.

The third objection which is to page 9, Paragraph 49, defense counsel objects to the use of simple assault as a

predicate act. Is this the same argument that you just made?

MR. KENT: Yes, ma'am.

THE COURT: The Court then would overrule Objection 3, page 9, Paragraph 49, in light of its previous findings, and permit both counsel for the defendant and Government to adopt their argument made.

Also as to Objection 3, the Court would note the argument as presented in Objection No. 3, and the position of the parties and would find that the position has been accepted as accurate.

Going on, then, to Objection 4, page 13, Paragraph 75. Defense counsel objects to the Probation Officer's inclusion in factors that may warrant departure, Section 5K2.4 of the guidelines.

As far as this objection, would defense counsel have objection to the Court taking up any questions of departure in the area of mitigation or aggravation, or would defense counsel wish the Court to rule on it as far as the report is concerned?

MR. KENT: I don't know that it matters, Judge, however the Court wants to proceed.

[42] THE COURT: The Court would find at this time that the total offense level is 37, the criminal history category is 6, which is 360 months to life imprisonment, three to five years supervised release, $20,000 to $2,000,000 fine, and a $250 special assessment.

Counsel maintains their previous argument, but is that an accurate calculation in accordance with the Court's findings?

MR. KENT: Yes, ma'am, it is.

MR. HENRY: Yes, Your Honor.

THE COURT: The Defendant, Terry Lynn Stinson, having entered pleas of guilty to Counts One, Two,

Three, Four and Five to the indictment charging bank robbery, possession of a firearm by a convicted felon, using a firearm during a crime of violence, possession of an unregistered firearm and interstate transportation of a stolen motor vehicle, the Court would adjudicate him to be guilty of said offense.

Is there any legal cause to preclude the pronouncement of sentence?

MR. KENT: No, ma'am, there is not.

THE COURT: At this time –

MR. HENRY: Your Honor, could I interject something just briefly?

If Your Honor has determined that he is entitled to two [43] points for acceptance of responsibility, I think that that would have to come off of the career offender as well, under the *Miller* decision, *United States v. Miller* – or *State of Florida v. Miller*. Even though the sentencing guidelines under which the crime was committed do not call for a two point reduction for acceptance of responsibility the latest amendments, the November, 1989, do entitle him to that.

THE COURT: That's the reason that the Court, in making the findings, went through the Presentence Investigation Report previously. Going through the report –

MR. KENT: Judge, I believe that Mr. Henry's comment has already been reflected in the calculation because we took the –

THE COURT: I think so, but that's why I went painstakingly –

MR. KENT: I think so.

MR. HENRY: That's where I –

THE COURT: – through it.

MR. HENRY: – that's why I'm confused, Your Honor, becuase he would get two additional points for

obstruction of justice under the career offender provisions. There is no –

THE COURT: The only way the Court can deal with [44] sentencing guidelines and the computation is to take it page by page, line by line, calculation by calculation. That's the reason each finding the Court made, the Court adjusted the numbers, asked the Probation Officer and counsel for the defense and Government if that was accurate in accordance with the Court's findings, reserving to counsel any arguments previously made.

I'm going to go back through – counsel may be correct but I can't deal with it in that way, Mr. Henry.

MR. KENT: Judge, let me retract, I believe Mr. Henry is correct, and as we go through it I think we'll see.

THE COURT: It may adjust and change.

If the Probation Officer would take it page by page, starting with page 4.

PROBATION OFFICER: Your Honor, in Paragraph 17, reflecting a total offense level of 18, Paragraph 19 we're adding 1, which results in a total of 19.

Paragraph 23, we added 2 for the obstruction of justice, which results in an adjusted offense level, Paragraph 24, of a total of 21.

Paragraph 25 reflects 4 levels; 26, five.

Paragraph 28, 2 additional levels.

Paragraph 29, the Court indicated a 2 level increase for obstruction of justice.

Paragraph 30 –

[45] THE COURT: That would be, 27 would be 2 – 27 would be 2, so 30 would be 13.

PROBATION OFFICER: 27 –

THE COURT: No, excuse me.

PROBATION OFFICER: Paragraph –

THE COURT: No, never mind. Go on. Mr. Kent, are we together so far?

MR. KENT: Yes, ma'am.

THE COURT: Mr. Henry, are we together so far?

MR. HENRY: Yes, Your Honor.

THE COURT: Go ahead.

PROBATION OFFICER: Paragraph 31 should reflect an adjusted offense level of 21.

Paragraph 32 should reflect a total offense level of 13.

Paragraph 33, total number of units assigned, 1½.

Paragraph 34, the greater of the adjusted offense level above should reflect 21.

35, increase an offense level 1.

36, combined adjusted offense level 21 – that should be 22, Your Honor. Paragraph 36 should be 22.

THE COURT: Is that correct, Mr. Kent?

MR. KENT: Yes, ma'am, I believe so.

THE COURT: Mr. Henry?

MR. HENRY: Yes, Your Honor.

[46] THE COURT: Mr. Carter.

PROBATION OFFICER: And on page 26 – I mean page 6, Paragraph 38, an adjustment for acceptance of responsibility should reflect a two level decrease, which results in a total offense level of 20.

MR. KENT: Judge, where the problem arises is –

THE COURT: Proceed through the rest of it.

PROBATION OFFICER: That's all I have on calculations, Your Honor.

THE COURT: The rest of the calculations remain the same.

What calculation are you addressing, Mr. Henry?

MR. HENRY: Your Honor, when you get to the career offender provisions – I'm looking for it –

MR. KENT: Page 9, Paragraph 49 and Paragraph 50.

MR. HENRY: Paragraph 49 reflects an offense level of 37. Under the sentencing guidelines promulgated in November 1, 1989, to which I believe Mr. Stinson is entitled to the benefits of those, he can't be harmed by them because of ex post facto, but I believe under *Florida v. Miller* he's entitled to the benefits, he would get a 2 point acceptance of responsibility which would give him a level 35 in a criminal history category 6.

That's important at this stage. It's important for me to know what the calculation is –

[47] THE COURT: Is that correct, Mr. Carter?

PROBATION OFFICER: Yes, Your Honor.

If the Court decides that Mr. Stinson is a career criminal, the Court will assign a new base offense level, and from that the adjustment should be subtracted.

THE COURT: So Mr. Kent, then, when the Court stated that the total offense level is 37 –

MR. KENT: That was not correct, it should be 35.

THE COURT: Is that accurate, Mr. Carter?

PROBATION OFFICER: Yes, Your Honor.

THE COURT: Is that accurate, Mr. Henry, from the Court's finding?

MR. HENRY: Yes, Your Honor.

THE COURT: The Court would find, then, that the total offense level is 35; the criminal history category is 6, which is 292 to 365 months.

The Court having adjudicated the defendant guilty of the offenses, is there any legal cause to preclude pronouncement of sentence?

MR. KENT: No, ma'am, and I appreciate Mr. Henry's noticing that.

THE COURT: Mr. Henry, is there any legal cause?

MR. HENRY: No, Your Honor, although I have an announcement to the Court as to a motion the United States wishes to make.

[48] THE COURT: Certainly.

MR. HENRY: Prior to sentencing, Your Honor, I'm aware that the Court gives the United States the opportunity to give information in aggravation, but I do want to state the United States at this time moves the Court to depart from the sentencing guidelines upwards to the level of 37, and the criminal history category of 6, which would give a sentencing range of 360 months to life in prison, and I intend to back up our request to the Court by additional information and testimony.

THE COURT: Certainly. This is referred to in Objection 4, page 3, Paragraph 75 in the addendum.

MR. HENRY: Yes.

THE COURT: Counsel may proceed. Will this be very lengthy, Mr. Henry?

MR. HENRY: I don't know how to judge it, Your Honor. I expect it could be.

THE COURT: If counsel and defendant wish to be seated at this time you may do so.

Mr. Randolph, he should hear me.

MR. HENRY: Your Honor, I would call Special Agent Sobolewski.

THE COURT: Certainly.

Would you raise your right hand, please.

(The witness is sworn by the Court.)

[49] THE COURT: Would you go ahead and take the stand –

THE WITNESS: Thank you, Your Honor.

THE COURT: – I think you'll be more comfortable.

MR. HENRY: May it please the Court.

THOMAS J. SOBOLEWSKI,

called as a witness by the Government, being first produced and duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HENRY:

Q. You're Thomas J. Sobolewski with the F.B.I.?

A. Yes, sir.

Q. And you have been so employed for twenty-four years?

A. Nineteen and a half.

Q. Nineteen and a half, I apologize.

You were the case agent investigating the bank robbery which has led us into court today, is that correct?

A. Yes, sir.

Q. During the course of your investigation as the case agent, was it your responsibility to receive and to house certain evidence seized from Mr. Stinson in Mississippi?

A. Yes, sir.

Q. Did you personally do an inventory of the items that were seized from Mr. Stinson in Mississippi?

A. Yes, sir.

[50] Q. If you could, without rushing too much so that the import of those items is not lost on the Court, but without spending too much time could you detail to the Judge some of the things, or all of the things that were seized from Mr. Stinson that have, by its nature, a potential for violence of something of that nature?

A. Yes. There were numerous items which had been recovered from the property of Mr. Stinson when he was arrested in the state of Mississippi on November 3rd, 1989, and included in those particular items, along with numerous items which were personal, included a quantity of hazardous materials which included the compon-

ents for additional bombs that could have been manufactured by Mr. Stinson or whoever had possession of those particular components.

Those components included items such as inert hand grenades.

Q. How many of those?

A. There were a total of three inert hand grenades.

There were fourteen shotgun shells. There were model rocket engines with igniters. There were boxes of, black plastic boxes with switches. There were two remote switches for garage door openers.

There was a sixteen ounce can of black rifle powder, a four ounce can of PVC cement, five books of matches, a 75 foot roll of speaker wire, a 15 foot section of blue two-[51]strand wire, two battery terminal connectors, an earphone jack, three size AA batteries, a roll of masking tape, a roll of waterproof tape.

A plastic bag, sixteen rubber bands, one rubber bottle nipple, two cross-tip screwdrivers, one black plastic O-ring, one razor knife and blade, two ¾ inch PVC pipe and caps, and a 1¼ ounce tube of Elmer's Glue.

All of these items which had been recovered, in my estimation, and in speaking with some individuals, including Gunner Hains from the United States Navy, could be utilized for the manufacture of explosive devices.

Q. There were other things found in Mr. Stinson's belongings, is that correct?

A. Yes. There were other items which included approximately – I don't remember the exact number, but it was a quantity of ammunition which was actually inert rounds of ammunition which could be utilized in the, in a model MAC-10 9mm. semiautomatic handgun.

Q. Was that found?

A. Yes, this was – these were items which were also found in the possession of Mr. Stinson when he was arrested in Gulfport, Mississippi.

Another item that was found was a Model M-16 automatic rifle, which is similar to a military rifle, which would be used by the military in this country.

[52]Q. Now you say model, was this a small model or a full size model?

A. No, it's a full size model which is, which looks exactly like an M-16 weapon. It's a replica of an M-16 weapon.

Q. What about the MAC-11, did it look exactly like a real MAC-11 pistol, automatic pistol?

A. It most certainly does. I think if anyone were ever confronted with either of these two weapons, or the Model 45 semiautomatic weapon which was also recovered, I think if anyone were ever confronted with those particular weapons that they would probably be interpreted as being real. I know if I were confronted with a weapon like that I would most certainly anticipate it being a real weapon.

Q. What else?

A. There was a New England Arms Company sawed-off 12 gauge single barrel shotgun, serial number NA-127586, which was an operational weapon, which was traced through investigation as being purchased by Mr. Stinson at the K-Mart store on Atlantic Boulevard, Jacksonville, Florida.

There were numerous items, other items, which included knives and components for clips – excuse me, components for military type equipment which included belts, some handcuffs – thumb handcuffs, excuse me.

Q. What about the knife? Describe the knife to the Judge.

[53] A. There was a huge Buckmaster knife, which is a military type knife, something that would be, I guess, easily described as a Rambo type huge knife.

Q. Did you also find a – did somebody do an inventory and provide you with a report?

A. Yes, sir.

Q. And who did the original inventory?

A. The original inventory was done by a Detective by the name of Landy Phillips from the Harris County Sheriff's office in Gulfport, Mississippi.

Q. And his report, Exhibit 16, lists numerous – or Exhibit 13, numerous items. Could you list some of the rest of the things that were found?

A. Yes. A black gas mask and filter, a black nylon SWAT type duty belt containing a Realistic brand ten channel programmable scanner and carrying case.

And, by the way, in association with that programmable scanner I found a list of the Jacksonville Sheriff's office call numbers. I also turned the programmable scanner on while in the office of the F.B.I. here in Jacksonville, and could intercept the various channels of all communications from the Jacksonville Sheriff's office.

Other items that were included were two clip pouches containing two .45 caliber clips each, one black nylon pouch, one black plastic canteen and carrying case, one [54] Buckmaster brand buck knife and carrying case containing two handcuff keys.

One Paralyzer brand stun gun, which was a functioning stun gun. One black nylon shotgun shell belt, one black nylon duty belt containing five nylon pouches, one of which contained two pairs of thumbcuffs, one black nylon shoulder holster, one black nylon pouch.

One black cloth tote bag with shoulder strap, one black beanie cap which was kind of a watch cap, is what

it is. One black military beret, one Delta patch, one brown leather belt, one Minolta Freedom 100 35 mm. camera with blue carrying case.

One yellow nylon rope, one black nylon braided cord, a can of Krylon – K-r-y-l-o-n – flat black enamel spray paint, one can of Aerboe – A-e-r-b-o-e – rustproof paint, three spools of multipurpose thread, two 12 inch hacksaw blades, two 10 inch hacksaw blades, one blue flat file, one blue round file.

One capital MX-2 35 mm. camera in a black case. The Radio Shack Police Call Radio Guidebook, which I previously mentioned. One KMC Profit 200 Solar Dual Power Calculator, one Texas Instrument Calculator.

A manilla envelope containing assorted papers, a radio antenna, a gold butterfly knife.

Q. Can you tell us what that is? It suggests something [55] small and pretty.

A. A gold butterfly knife?

Q. Yes, sir.

A. It's just a folded hand knife.

Q. When it's unfolded what size would it be?

A. Well, it's approximately, the blade I think was three or four inches in length.

Q. Okay.

A. One belt buckle bearing the words, "State of Texas."

A pack of 20 sewing needles, an empty brown bag, a man's combat coat, a black pair of combat trousers, two white towels, and a replica screw-on aluminum silencer which could have – which can be fixed to the replica 9 mm. Uzi type weapon, which was also located.

Q. Did you see that also?

A. I certainly did. I tried the, I affixed the replica silencer to the replica Uzi type machine gun.

Q. We've called it a MAC-11 earlier, is that the same weapon that you're talking about? The Uzi and the MAC-11, is that the same thing?

A. Yes, sir. Excuse me if I addressed it as a MAC-11 previously, I was incorrect; it's an Uzi, U-z-i type weapon.

Q. Okay, thank you.

MR. HENRY: No further questions, Your Honor.

MR. KENT: Just a couple of questions, Judge.

[56] CROSS EXAMINATION,

BY MR. KENT:

Q. Mr. Sobolewski, there was just one real gun in all of this stuff, though, wasn't there?

A. Yes, sir, that was the sawed off shot gun.

Q. And that was purchased at the K-Mart over on Beach Boulevard in Mr. Stinson's – he used his own name, didn't he, his true name?

A. Yes, he did. As a matter of fact, the other half of that shotgun, the remaining part of the barrel had been recovered in the shotgun – excuse me, in the pickup truck that had been used by Mr. Stinson in his escape from the robbery.

Q. And these other weapons are model guns, toy guns. Although they look very real, look just like the real thing –

A. Yes.

Q. – can be mistaken for the real thing, they are just toy guns?

A. They are replicas, yes, sir.

Q. And if you – you couldn't, in fact, injure anyone with those models or toy guns unless you banged them over the head with them, could you?

A. That's correct.

Q. And so if somebody meant to injure or hurt someone, [57] they wouldn't have that kind of weapon, would they? Or they couldn't use that kind of weapon to injure or hurt?

A. They could use it to injure or hurt someone if they struck them but not to shoot them, if that's what you're trying to determine.

Q. Yes.

A. Yes, sir.

Q. And the last question. No one in this whole ugly, terrible crime spree, no one was physically injured, was there?

A. Not that I'm aware of.

Q. Thank you, sir.

MR. HENRY: No questions.

THE COURT: Thank you.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

MR. HENRY: Your Honor, what is the Court's pleasure for argument at this time?

THE COURT: Is there any further testimony?

MR. HENRY: No, no more testimony, Your Honor. I'm prepared to argue.

THE COURT: Mr. Kent, if you and your client would come forward, then.

We're arguing both mitigation and aggravation, so it would be Defendant's Objection No. 4, page 13, Paragraph 75. [58] The Government's motion for upward departure pursuant to 5K, §2, and Defendant's motion, any motion concerning mitigation.

Mr. Henry.

MR. HENRY: Your Honor, §5K2 gives a number of alternatives, but not all inclusive alternatives; but one of the ones it does use is the abduction.

I studied the guideline manuals before coming into court today because we've been with them approximately two years now and sometimes we overlook the simplest precepts of what the guidelines are designed for. Whether or not you approve of them or disapprove of them, they're still the law and we have to abide by that.

There are some interesting things in the guidelines. They quote a statutory mission. In the statutory mission the basic purpose of criminal punishment they give four. I would assume by the fact that they list them, that they list the most important in their minds first and the least important last. Those four are to deter crime, to incapacitate the offender, to provide just punishment, and then last, to rehabilitate the offender.

It also notes that in dealing with the guidelines how difficult it is to reach everyone's philosophical considerations in the guidelines or in imposing the sentence.

[59]One of the philosophical considerations that the guidelines recognizes is one they call just deserts, in other words, will the defendant get what he justly deserves for doing the crime, noting that the offender's culpability and the resulting harms are two things that that philosophy looks at.

The second philosophy is one of crime control. The first consideration is will it lessen the likelihood of future crime, and second, will it deter others.

It is my position that whatever philosophical consideration this Court believes internally, that in either case, whether it's just deserts or whether it's crime control, this Court should sentence Mr. Stinson to life in prison.

This case involves a number of different things that even the career offender provision overlooks. The career offender kicks into place when certain things happen.

The three – the two prior felonies, and a certain type of offense; the two prior violent felonies kicks it in, too. And what it doesn't look at is what happens surrounding the crime itself, because once it gets to the career offender then those things surrounding the crime no longer play in the making of the point system. That's the one thing that I was most concerned about.

A person who – possession of a firearm by a convicted [60]felon with two prior felonies who is just walking down the street, is automatically entitled to – depending on Mr. Kent's standpoint – a 25, and we say it's a potentially violent felony and that it's automatically a 37.

But it forgets about some of the other things that go along with the crime. That's a crime where it's a status offense, a person is walking with a firearm.

In this case we have an abduction to carry out the crime itself. The car dealer was abducted, placed in a closet, told that there was an explosive device in the apartment and that if he moved within forty-five minutes he'd blow up with it. He was put into the closet, bound at gunpoint with the shotgun, in order to steal the conversion van which was used to get away from the Jacksonville area. In fact, the evidence showed that Mr. Stinson went to Disney World because a Disney World parking pass was found in the van stamped with the same date in that afternoon.

Another consideration in this case is that he brandished a dangerous weapon both in the bank and to the car dealer. In the bank he brandished both the shotgun and the grenade.

The sentencing guideline notes on page 1.14 that you consider it a dangerous weapon if the object appeared to be a dangerous weapon. In this case it was an inert grenade, in other words, there was no powder in it; but to all

[61] intents and purposes to the people that were in the bank, and even to the police officers and the ordnance disposal people who came to the bank later on, it appeared to be a live grenade.

There was a firearm used in the case, the shotgun.

This involved more than minimal planning, because we see from both the testimony of the witnesses that were interviewed after the case, and the testimony of Special Agent Sobolewski, there was a police scanner which was tuned in to the Jacksonville Sheriff's office frequencies. It involved getting a getaway vehicle, it involved placing himself in a position where he could get to and from the bank in the easiest manner.

We note that in this particular case, since his escape, contrary to what Mr. Kent would have the Court believe that he's had minimal criminal involvement since his escape, since his escape we note that the victims who have been touched by Mr. Stinson include the owner of Cox Pools in Tallahassee, who was taken at gunpoint with one of the model weapons. He was taken at gunpoint, forced to write a check, and was put in thumbcuffs before Mr. Stinson stole his truck and fled the scene.

In the bank we have the three people that were in the main part of the bank that came under Mr. Stinson's gaze, who saw the grenade, saw the scanner and saw the firearm, [62] including Ms. Benson, Ms. Nevins and Ms. McGraw, who have told me that they are concerned, they're concerned with this type of act as any banker and any employee of the bank would be, and they fear for their safety in the bank and think the Court should send a message.

There were other people in the bank who were not in the main area when the bank was being robbed, who have suffered trauma as a result of it, to come out from the

bank and find out that there is a grenade which for all intents and purposes looks like a real grenade, in the lobby, that their bank has been robbed. Some of those employees have left the bank as a result of this particular bank robbery, whose effectiveness as bank employees suffered even before they left the bank.

The Sun Bank itself was the victim of missing $1,996.34.

The car salesman, Mr. Dormany, is a victim. He was abducted, he was terrorized, he was put into a closet.

The company that he works for, Mike Davidson Ford, has been a victim. They suffered a loss of $967.49 as a result of having to recover the car, the conversion van, bring it back, make repairs that needed to be made.

The McDonald's at University and Beach Boulevard was a victim of Mr. Stinson because of placing the bomb in the restroom. They had to vacate the McDonald's. There was [63] some damage to the restroom caused by the ordnance people when they disarmed or rendered the bomb neutral.

And we also have as a victim the United States Navy who had to spend their time and their efforts to dispose of two bombs.

We note that – even though the Court has already considered this in determining Mr. Stinson is a criminal history category 6 we note that he has a burglary in 1977, an aggravated assault in 1978 where a handgun was used, an armed robbery in 1979 where a handgun was used, an attempted escape from the prison in 1981 in Mississippi, and I guess we'd have to ask the prison officials how in their infinite wisdom they would put somebody with Mr. Stinson's background in a minimum security county facility where he was allowed to walk away from the facility in 1989 and escape to Florida.

We also note from the presentence investigation that there were two counts of armed robbery dismissed in a plea bargain.

We also have the assault on the correctional officer in 1982, which was the escape where he used the zip gun, a homemade gun.

Mr. Stinson is facing armed robbery, kidnapping, grand theft auto and use of a firearm in a felony in Tallahassee, and he's also facing armed robbery, kidnapping, auto theft [64] in Jacksonville.

The inventory that I asked Special Agent Sobolewski to read was done for a specific purpose, and that is to advise the Court that Mr. Stipson appears to be a man who is arming himself for war. Whether it's war against society or war against a specific individual, but Mr. Stinson had the beginnings of an entire outfit, military outfit.

He has demonstrated through his conduct in the past, and I believe by the things that we have shown the Court today, that he has the potential for escalating behavior. Mr. Stinson is a human time bomb looking for a place to go off. We've believed that from the beginning, we believe it today. The more information we receive only reinforces our belief that Mr. Stinson has the potential to kill someone, that's why we've asked for that life sentence.

This Court should not buy Mr. Stinson's story that he robbed a bank in order to get thrown into Federal prison to stay away from Mississippi prisons because the execution, in other words the way he carried this out, just does not make any sense. Most of the things that Mr. Stinson did to prepare for this bank robbery and the things that he did subsequent to the bank robbery do not support that justification defense that he's brought to this Court.

First of all, he had the fake hand grenade that he took into the bank. The first thing anybody in the bank saw was [65] the fake hand grenade.

He had a fake .45 caliber pistol with a shoulder holster that would only need to be displayed to the individuals. I expect at some point in time that Mr. Kent will tell you, and I'll tell you in advance, that the .45 had a little red dot on the end of the barrel. If it were pointed at somebody it would be apparent that the gun itself was not real. But in a shoulder holster or tucked into a waistband the gun is absolutely faithful to a .45 caliber Colt pistol, as noted by Special Agent Sobolewski.

He had the fake Uzi with the silencer that for all intents and purposes looked like a real weapon.

Any of those devices could have been used to rob that bank without having to get a sawed-off shotgun. And even assuming that the sawed off shotgun looks more real, which there will be no evidence before this Court that that's true, he also bought fourteen 12 gauge rounds to go along with the shotgun. That weapon was totally unnecessary if all he needs to do is rob a bank. In fact, I submit to the Court, he doesn't need to come all the way to Jacksonville, Florida, to rob a bank, that he could have done that anywhere if his goal is to get into a Federal prison.

He didn't need to steal a van. He didn't need to go to Disney World. He didn't need to spend almost two thousand dollars in cash.

[66] He has a number of excuses for what he does and why he does it, and the Court has been given some of the information from which I get this information. But I submit to the Court that Mr. Stinson's excuse for everything that's happened in his life – and let me say that it is difficult to argue this on the one hand without saying

that I feel sympathy for Mr. Stinson. That may be hard for Mr. Stinson to believe because of the tenor of my argument, but I do. I think it's a tragedy to this society that Mr. Stinson's life has been so wasted. I see no potential for Mr. Stinson to come back into society and to do anything good, but I see some great potential for Mr. Stinson to harm people, and that's the position and the reason for the position we take.

But Mr. Stinson has lived his life by making excuses for why he does what he does. I've been provided, and I believe the Court has been provided, with a letter that Mr. Stinson wrote to Mr. Kent, showing that – or trying to make excuses for what he did. In a nutshell what he says is that he came from a broken home, that peer pressure caused him to do some of the things he did; and then as he became an adult every time he got into a situation he panicked, and that's what caused those things.

I was also provided with his jail jacket from the Mississippi prison and note that in the presentence investigation for the armed robbery where he shot an [67] individual, his excuse for that was the individual, the victim had a pistol in the car and the farther they went the more afraid that Mr. Stinson would get and finally Mr. Stinson claims that he blanked out and doesn't know what happened after that.

And then in the instant offense we see an additional cop-out, and that is that he's afraid of going back to Mississippi prison and therefore he wants to be put into a Federal prison.

What you see, Your Honor, is an individual who has lived his life in nothing but a destructive manner, and who shows every potential for continuing that destruction.

The only sentence that will deter Mr. Stinson and incapacitate Mr. Stinson and provide just punishment

for Mr. Stinson's conduct here, and in relationship to his conduct in the past, is to give Mr. Stinson a life sentence, and we respectfully ask this Court to sentence Mr. Stinson to life in prison.

THE COURT: Mr. Kent.

MR. KENT: Thank you, Your Honor.

Mr. Henry, and the Court.

Judge, I have several exhibits and copies for the Government I forgot to give them earlier.

What these are – much of it is redundant, it appears to be a lot but the first several items are – I provided to [68] Mr. Henry the prison record of Mr. Stinson from Mississippi which I subpoenaed, and which in fact was returned, the subpoena was returned directly to Your Honor.

Out of that prison record, which is quite thick, I pulled what I felt to be the evidence that Mr. Stinson, while he was at Parchman, the Mississippi State Prison at Parchman, Mississippi, that he had in fact cooperated with Federal authorities in giving information about a rather major money order postal scam or forgery ring that was operating out of the prison; and as a result of that cooperation, which also involved evidence against people who worked at the prison, it was determined that his life was in jeopardy. That is the reason, which otherwise might seem somewhat inexplicable, why Mr. Stinson was transferred to this Leflore County jail.

Now, one of the first is this red tag item. Now, this isn't just Mr. Stinson's own statement, but this is in the top of the prison jacket now. When Mr. Stinson was arrested in Gulfport after this crime spree, he was taken back to Parchman and the first thing they put in the top of this file was this red tag report indicating that his status is he needed to be in protective custody.

Then the next item – these are somewhat out of order – is a statement showing that he was released to the county jail by the Superintendent of Corrections. The explanation [69] for that comes later.

The third defendant's exhibit is the escape report, and this is just to back up what I said, that he walked away as a trusty, that is from the Leflore County jail. That was on January 7th, 1989.

The next, Exhibit 4, is a certification from the Circuit Judge, and the full certification is in the prison record which I provided Mr. Henry, after this simple assault and escape attempt from Parchman, which happened back when Mr. Stinson was twenty-one years old, the Circuit Judge there who sentenced him on that simple assault and escape certified that,

"None of said prisoners are especially dangerous, nor will they require more than ordinary care and precaution in handling in my opinion."

And the previous page listed Mr. Stinson; there were three or four prisoners who were being sent back.

Then Exhibit No. 5, just another reference to his statements that he had made.

Exhibit No. 6 is especially interesting, and I believe that from the best I could tell this is a security level designation from Parchman. This designation was made after the arrest in Gulfport, after this – after the totality of his criminal history at Parchman, who has known him for what, eleven years or more, designated him as just [70] moderately dangerous and on the adjustment moderate security is necessary.

Then there's Exhibit No. 7, which is again a review of his protective custody status. It was necessary to maintain it because his life was still in danger.

Exhibit 8 is the same thing, another review, he still needs to be in protective custody.

Exhibit 9 is where he is actually transferred to Rankin County Correctional Facility which is another county jail. That was his first transfer for protective custody.

Then there's a statement from the Superintendent of the prison himself, which this is Exhibit 10, and it's signed by the Superintendent:

"This inmate has cooperated with MDOC officials, narcotics agents and law enforcement officials by giving information regarding money order scams, use of illegal drugs, and implicating inmates involved in these activities.

"The administration feels that protective custody is warranted for the safety and welfare of this inmate."

Exhibit 12 is a letter from Deputy Superintendent – and this is the end of April, 1988 – suggesting that they should take him out of the county jail and put him back in Parchman because it wasn't necessary to keep him in Parchman, and this was the gist of Mr. Stinson's concern and why he escaped from the county jail or walked away, because [71] he had learned or heard or believed that, in fact, every three months they were reviewing his protective custody and reviewing keeping him in the county jail, and he had learned that the next review they intended to take him back to Parchman.

This is indicated here, that review was at least one that the Deputy Superintendent was recommending he come back to Parchman.

Exhibits 13 and 14 are just interviews by Mr. Eddie McFarland, who is the Investigator for the Federal Public Defender in Tallahassee, Florida, who interviewed two of the employers of Mr. Stinson while he was, the year he was out in Tallahassee working, and they both comment favorably on him and I think support the statements I made earlier that there was a rowdy crowd in the construction crew but Mr. Stinson behaved himself and stayed out of the scrapes and was a good worker.

Exhibit 15 is, it's a lengthy letter that was written back at the time Mr. Stinson was in the county jail in protective custody, explaining his fear of being taken back to Parchman, and it explains in some detail the threats and the cooperation he had given.

So, this is not something, in other words, that's being manufactured here today.

We're not asking the Court to agree that this crime in [72]any way was justified in any way by these threats. That's not the position. I am asking the Court to understand that these threats were real, that Mr. Stinson was in part motivated by this. It didn't justify the crime, that's why we didn't go to trial. I persuaded Mr. Stinson this is no justification for crime. It's certainly not legal and not equitable either, but it was in his mind a motivating factor and it's not something that's just being manufactured here today.

This letter shows that back at the time he's in the county jail what was motivating him and his fear that he's going back to Parchman.

Exhibit No. 16 is just a newspaper report from the time of the arrest. It indicates he surrendered peacefully.

Exhibits 17 and 18 are F.B.I. 302 reports from the agents on the scene who, one, indicates to support my statement that he did cooperate, signed the consents that allowed them to, or on which they searched the van and the motel room in which they recovered the fruits and instrumentalities of the crime, the money, what was left, and the gun.

And the last exhibit, the 302 indicates that when advised of his rights he said he wanted a lawyer and so the F.B.I. properly didn't question him any further, and that's why no statement was given.

[73]Those were the exhibits, and I would ask the Court to accept those in evidence.

MR. HENRY: No objection.

THE COURT: Those will be filed in evidence.

(Defendant's Exhibits Nos. 1 through 18 rec'd in evidence.)

THE COURT: The Court has reviewed while sitting here the exhibits. Except for the prison record most of the exhibits had previously been reviewed and read, including the letter written by Mr. Stinson.

MR. KENT: Judge, I'll make my comments very brief now, other than that evidence.

If you look at Mr. Stinson's background, there is a series of crimes there, other crimes, a series of crimes committed back when he was seventeen, eighteen, nineteen years old. Now he's thirty years old today. He was sentenced to twenty years in Mississippi for that aggravated assault, then he was taken up to Illinois and sentenced to ten years on the armed robbery up in Illinois.

Now, he tried to escape when he was twenty-one years old from Parchman, which is a notorious Mississippi prison. That escape, he was sentenced on that for the simple assault.

But after that, from the time he was twenty-one to the time he was thirty, there weren't any serious problems. I'm [74]not going to say he was a model prisoner because he wasn't, but he did cooperate with the law enforcement authorities, and he was at least model enough that the year or so he was at Leflore County jail he was a trusty and allowed free run to come and go as he pleased. So he went almost ten years in custody where he was, he was okay.

Now, he was out of prison or out of jail there for almost a year and he didn't commit any new crimes until

this crime spree here that he's being sentenced on. There weren't any arrests. He held a job, he supported himself; and considering I'd say a kid from the time he was seventeen who'd been in prison, now that he gets out and what does he do, he doesn't go out and start robbing convenience stores or robbing gas stations, or snatching purses, but he puts himself to work in a construction crew – I'd ask the Court to consider that strongly – and he does work for almost a year and his employers testified as to his quality as a worker.

He lived at peace, and this was until the traffic stop. He gave his name, as I explained already. He was laid off from work for lack of work in the construction crew, and he comes back home and his roommate says they're here with a warrant, they came by today with a warrant for your arrest. And he just panicked.

This fear of Parchman is no justification for the [75] crime, but that was what was in his mind – that's what was in his mind.

Now, his thinking, not very good, pretty stupid, but was that he's going to commit a Federal crime, he'll get in Federal custody. If he's lucky he'll get a concurrent sentence and he won't have to go back. He only has ten years left on his Parchman sentence, he'll get about ten years, he was thinking, for a Federal bank robbery, and he'll serve that in Federal custody and he won't have to worry about Parchman again. That was the thinking. It's stupid, it's wrong, but that was what he was thinking.

Now, he admitted the offense. That was a trial strategy. He pled, he pled to also avoid the trauma for the witnesses who were the victims in this case. He put his signature on the crime, that's quite clear, that hasn't come out here today. But everything he did, the gun he

bought it in his name, I did bring that out from Mr. Sobolewski. He went and rented an apartment across the way from the bank that was robbed, in his own name.

When he want to get this conversion van he gave his own name. In fact, I believe he showed his prison I.D. as the identification he gave at the car dealer. When he went riding with this car salesman, when he abducted the car salesman he told the car salesman what he was going to do and he told him who he was, and even showed him his prison [76] I.D.

At the bank he didn't make any attempt to cover his face or conceal who he was. Also at the, where he bought these toy guns and things he used his own I.D., his own name.

He robs the bank, he goes back to the apartment and picks up this conversion van he's stolen, he's stolen having left his identification at the car dealer who he is.

Yes, he had a police scanner and he knew from that scanner that they were tracking him because they had put in the bait money a radio transmitter, and from the police scanner from the very beginning he knew he was being tracked and he didn't do anything to dispose of the bait money or the radio transmitter.

Now, there were no injuries to anybody. A horrible crime, but still it could have been really bad. It could have been a case where departure had been warranted. He could have gone in there and fired the shotgun. I mean, he didn't even give a warning blast of the shotgun, he didn't shoot at anybody. He could have armed himself when the F.B.I. and all the law enforcement people surrounded the motel. It could've been a ugly, ugly scene, as they thought it was going to be and they were prepared for that. But he didn't commit any act of violence that injured anybody physically.

[77]Judge, I'd ask the Court to consider sentencing Mr. Stinson to the low end of the guidelines. Now, the low end of the guidelines here, this is no break, it's twenty-four, as I calculate it now under the present guideline the Court has determined would be twenty-four years and four months, plus the consecutive minimum mandatory five years. In other words, the minimum sentence, the minimum sentence today is twenty-nine years and four months. Mr. Stinson is thirty years old, he'll be sixty years old. And that – and I ask the Court to give Mr. Stinson a sentence concurrent with the sentences he's already under. His earliest release under his Mississippi sentence is the year, I think, 2001, and then he has to go to Illinois for another ten years.

If this Court does not impose a concurrent sentence, even if you give him a low guideline, low end of the guideline, it will be a life sentence because he has another twenty years to serve on the state charges that he already has convictions on. So a concurrent sentence, low end of the guidelines, his earliest release from Federal prison would be when he's sixty or right at his sixtieth birthday.

Even if Mr. Stinson is as dangerous as Mr. Henry believes he is, I don't think that there's any way to suggest that he will be that dangerous individual when he's sixty years old, thirty years from now. I think thirty years is plenty of time for this offense.

[78]THE COURT: Mr. Stinson, would you like to make any further statement?

MR. STINSON: I know I've made a lot of mistakes, you know, frankly, you know, I'd like to say, you know, that I realize what I did was wrong, you know, and it affected a lot of people's lives, which I can't change now. But, you know, I wish there was some way I could, but you know, it's – you know, it's tied up the court system

and everything over something that I shouldn't have did in the first place, but I can't change what I've done did, you know. So, I guess I got to, you know, accept whatever is given to me.

Besides that I ain't really got much more to say.

THE COURT: Mr. Henry.

MR. HENRY: Your Honor, just very briefly.

The one thing that Mr. Kent did give to the Court, Exhibit No. 11, is a notice that the same people who are assessing whether he needs custody or not are saying that he no longer needs protective custody. He wants you to believe that the prison officials, when they say he's in some danger, although I suggest to the Court that if the Court reads through the information very carefully you'll see that they're making that assessment based upon what Mr. Stinson is telling them, but he doesn't want you to believe those same people when they say he doesn't need protective custody. For Mr. Stinson, when things don't go right he [79]panics and people have a great potential of getting hurt.

The most telling thing is that if Mr. Stinson is so frightened of prison in Mississippi why did he go back to Mississippi after committing this crime, if his sole reason was to be put into a Federal facility. That along with the other things Mr. Stinson has done makes no sense in the justification argument, and therefore we maintain our position that only life in prison is going to protect society from Mr. Stinson.

MR. KENT: Judge, I included that in an attempt, I guess, to be fair and frank in the disclosure, but after that there were reviews every three months of his custody status, and that letter of input to the classification committee was April 28th of 1988, I believe it is, and he continued in protective custody, and in fact continued at a

county jail as a trusty for four – I mean eight months after that. So there clearly were several classification committee reviews after that letter and the opinion of that writer was rejected.

But there were voices which were counseling bring Mr. Stinson back to Parchman, and he did believe he was going back to Parchman. His parole date was only about eight or nine months after, after his – from the date of his escape in January. He had a parole date from the prison record of around September or October of the year he escaped, which of [80] course would have meant he would have then gone to Illinois if he had been paroled.

But he did have a genuine concern about his safety at Parchman.

THE COURT: The Court would find no legal cause to preclude the pronouncement of sentence.

First of all, the Court would find that it has before it a guideline range of 292 to 365 months.

Counsel for the defendant's motion is for the Court to sentence in the low end of the guideline range, and also to make that sentence concurrent with the other sentence he's presently serving.

The Government's motion is that with the defendant's history and conduct, a sentence for life would be the only sentence that would make society safe.

The only concern that the Court has right now is that the sentencing under Federal guideline sentencing and sentencing under state sentencing are so different that the public has the right to be very, very confused by sentences. The public is used to hearing a life sentence and reading that someone gets out, or is used to hearing a thirty year sentence and people getting out in five years. That does not happen under the structure of sentencing guidelines. There is no parole.

The Court would find that the defendant's conduct, the [81] abduction and unlawful restraint, the disruption of the governmental function of the United States Navy and other law enforcement officials would make the upper end of the guideline range warranted, and without exceeding the guideline range the Court would find that those very factors the Government is concerned about and which concerns the Court greatly, can be accomplished.

Therefore, it is the judgment of this Court and the sentence of the law that the defendant be committed to the custody of the Bureau of Prisons as to Counts One, Two, Four and Five, to be imprisoned for a term of 365 months; as to Count Three, he is to be committed to the custody of the Bureau of Prisons to be imprisoned for a term of five years, that term to be consecutive to Counts One, Two, Four and Five; and the Court would decline to make any recommendation regarding concurrent sentencing.

The defendant would be placed on five years supervised release, and based on the financial status of the defendant the Court would waive imposition of fine. The special assessment would be due forthwith.

Again, the Court having stated its reasons for sentencing in the upward range, would find that if the range did not contemplate a high enough sentence to protect society the Court would have gone outside the range, and has stated that now two times in the sentencing.

[82] The Court having pronounced sentence, does counsel for the defendant or the Government have any objection to the sentence or the manner in which the Court pronounced sentence, other than those previously stated on the record?

MR. KENT: No, ma'am.

MR. HENRY: No, Your Honor.

THE COURT: The defendant would have ten days from this date to appeal. Failure to appeal within the ten day period would be a waiver of the right to appeal.

The Government may file an appeal from this sentence.

You're advised that you're entitled to the assistance of counsel in taking an appeal, and if you're unable to afford a lawyer one will be appointed to represent you.

If there's nothing further we'll be in recess at this time.

(Recess 12:00 o'clock, Noon.)

-o0o-

[Reporter's Certificate Omitted In Printing]

APPENDIX E

UNITED STATES DISTRICT COURT
Middle District of Florida

[Filed 7-6-90]

UNITED STATES OF AMERICA

V.

TERRY LYNN STINSON

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number 90-6-Cr-J-14

William M. Kent
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s): One, Two, Three, Four and Five of the Indictment

☐ was found guilty on count(s)_____
_____ after plead of not guilty.

DATE OF OFFENSES: OCTOBER 31, 1989.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18,U.S.C.,2113(a)&(d)	Bank robbery.	One
18,U.S.C.,922(g),924(a)(2), 924(e)	Possession of a firearm by a convicted felon.	Two
18,U.S.C.,924(c)	Using a firearm during a crime of violence.	Three
26,U.S.C.,5861(d),5871	Possession of unregistered firearm.	Four
18,U.S.C.,2313	Interstate transportation of motor vehicle	Five

The defendant is sentenced as provided in pages 2 through _____ of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $250.00 which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
353-62-6176

July 6, 1990
Date of Imposition of Sentence

Defendant's mailing address:
c/o U.S.Marshal

/s/ Susan H. Black
Signature of Judicial Officer

Defendant's residence address:
c/o U.S. Marshal

SUSAN H. BLACK,
Chief Judge
Name & Title of Judicial Officer

July 6, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 365 months as to each of Counts One, Two, Four and Five of the Indictment, each count to run concurrently with each other.

IT IS FURTHER ADJUDGED that as to Count Three of the Indictment, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIVE (5) YEARS, to run consecutively to the sentence imposed in Counts One, Two, Four and Five.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

a.m.

☐ at _____ p.m. on _____ .

☐ as notified by the Marshal.

☐ The defendant shall surrender for services of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____

with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant is prohibited from possessing firearms or other dangerous weapons.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

(1) The defendant shall not commit another Federal, State or local crime;

(2) the defendant shall not leave the judicial district without permission of the court or probation officer;

(3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report with the first five days of each month;

(4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(5) the defendant shall support his or her dependents and meet other family responsibilities;

(6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for school, training, or other acceptable reasons;

(7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

(8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

(9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(14) as directed by a probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FOR THE MIDDLE DISTRICT OF FLORIDA
STATEMENT OF REASONS

TERRY LYNN STINSON

DOCKET NO. 90-6-Cr-J-14

The Court adopts the factual statements in the presentence report as to which there is no objection, and, as to the controverted factual statements, the Court adopts the position of the probation office as stated in the addendum.

The Court finds no reason to depart from the sentence called for by the guidelines, inasmuch as the facts as found are of the kind contemplated by the Sentencing Commission.

The guideline range exceeds 24 months and the reasons for imposing the selected sentence are as follows: the sentence is being made for the upper range of the guidelines due to the continuing and persistent danger that the defendant continues to present to the public and a history of assaultive and violent behavior, as evidenced by the offender's past criminal record.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3711.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRY LYNN STINSON,
Defendant-Appellant.

October 4, 1991.

Defendant pled guilty to five counts including bank robbery and possession of firearm by convicted felon and was sentenced under career offender provisions of guidelines by the United States District Court for the Middle District of Florida, No. 90-6 Cr-J-14, Susan H. Black, Chief Judge. Defendant appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) possession of firearm by felon was "crime of violence," and (2) application of amended Sentencing Guidelines did not violate constitutional protection against ex post facto laws.

Affirmed.

William M. Kent, Asst. Federal Public Defender, Jacksonville, Fla., for defendant appellant.

Ronald T. Henry, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and EDMONDSON, Circuit Judges, and DYER, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

In this case, we decide whether a conviction for possession of a firearm by a felon qualifies as a "crime of violence" for purposes of enhancing a defendant's sentence under the "career offender" provisions of the Sentencing Guidelines. We conclude that illegal weapons possession by a convicted felon is inherently a "crime of violence" as defined by the Guidelines, and we affirm the sentence imposed by the district court.

I.

On October 31, 1989, defendant Terry Lynn Stinson robbed a bank in Florida. A few days later, defendant was arrested. At the time of his arrest, defendant was in possession of three inert hand grenades, ammunition, a number of components for the construction of bombs, a razor knife, and a sawed-off shotgun.

Defendant pled guilty to a five-count indictment charging him with bank robbery, in violation of 18 U.S.C. §2113(a), (d), possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§922(g) & 924(a)(2)(e),[1] use of a firearm during, and in relation

[1] Section 922(g) states in pertinent part:

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . .

[footnote continued]

to, a crime of violence, in violation of 18 U.S.C. §924(c), weapons registration violation, in violation of 26 U.S.C. §§5861(d) & 5871, and transportation of stolen property through interstate commerce, in violation of 18 U.S.C. §2312. Defendant had been earlier convicted of three violent felonies. In July 1990, defendant was sentenced under the career offender guidelines to 365 months imprisonment, consecutive to the mandatory minimum five-year imprisonment for use of a firearm during commission of a crime of violence.

II.

A. Career Offender Guidelines

1.

This case is controlled by the career offender provisions, sections 4B1.1 and 4B1.2, of the Guidelines.[2] Under section 4B1.1, a defendant is a career offender if:

(1) the defendant was at least eighteen years old at the time of the offense,

(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §922(g).

[2] Section 4B1.2 and its application notes were amended effective November 1, 1989. Because defendant was sentenced after that date, the amended guidelines and application notes apply. *See* 18 U.S.C. §3553(a)(5) (sentencing courts are to apply the guidelines and policy statements "that are in effect on the date the defendant is sentenced"). We address further the applicability of the amended guidelines *infra* at sections II(A)(2) & (C).

> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. §4B1.1. Defendant argues that the district court's use of his possession of a firearm by a convicted felon conviction as the predicate "crime of violence" offense for career offender purposes under U.S.S.G. §4B1.1, was improper. Defendant argues that possession of a firearm by a convicted felon is not a "crime of violence."

Section 4B1.2 defines the term "crime of violence," borrowing language from 18 U.S.C. §924(e) of the Armed Career Criminal Act:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of injury to another.*

U.S.S.G. §4B1.2 (1989) (emphasis added).

In the application notes to section 4B1.2, the Sentencing Commission has listed a number of crimes fitting this definition and has noted that other offenses are included where

> (A) that offense has an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (B) *the conduct set forth in the count of which the defendant was convicted* involved use of explosives

> or, *by its nature, presented a serious potential risk of physical injury to another.*

U.S.S.G. §4B1.2, comment. (n.2) (emphasis added).

The defendant's weapons possession conviction is not among those specifically listed in section 4B1.2 or its application notes, and does not have as a statutory element "the use, attempted use, or threatened use of physical force" as provided in section 4B1.2(1)(i) and application note 2(A). We therefore consider whether the weapons possession conviction satisfies the requirements of section 4B1.2(1)(II) and application note 2(B).

2.

Defendant argues that we cannot look beyond the generic definition of the offense to determine whether weapons possession by a felon is a "crime of violence" under section 4B1.2(1)(ii) and application note 2(B). In support, defendant cites *United States v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir. 1990), in which we held that the term "crime of violence," as used in an *earlier* version of the career offender guidelines, "contemplate[d] a generic category of offenses which typically present the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs."

Such a categorical analysis certainly is allowed under the amended guidelines and application notes. Section 4B1.2(1)(ii), as amended, provides that an offense constitutes a "crime of violence" where it "involves conduct that presents a serious potential risk of physical injury to another." Application note 2, as amended, clarifies that an offense qualifies if "*by its nature*" that offense involves "a serious potential risk of physical injury to

another." Under the amended guideline and application note, then, a sentencing court need not consider the facts underlying a particular offense, assuming such an inquiry is permissible, if the offense "by its nature" presents a serious risk of violence – the offense is a "crime of violence" whether or not the violence actually materialized in the specific conduct with which defendant is charged. Because we conclude that a categorical analysis is at least *permissible* under the amended guidelines, and because (as discussed *infra*) we think illegal firearm possession by a convicted felon "by its nature" imposes "a serious potential risk of physical injury," we need not decide today whether *Gonzalez-Lopez* should be applied to the guidelines and application notes as amended to *require* only a categorical analysis.[3]

---

[3] We note, however, that the holding in *Gonzalez-Lopez* is distinguishable on a number of grounds:

First, the amended version of §4B1.2 applicable here takes its definition of the term "crime of violence" from a different source – 18 U.S.C. §924(e) – than the earlier version.

Second, the holding in *Gonzalez-Lopez* was influenced by the practical difficulties and potential unfairness to the defendant of allowing the sentencing court to determine, in an ad-hoc mini-trial, the actual facts underlying *prior* convictions. *See Gonzalez-Lopez*, 911 F.2d at 547-48. Here, because the offense at issue is the offense of conviction, not a prior conviction, the district court would look only to conduct relevant to the instant proceedings, much like the sentencing court normally does in the course of sentencing a defendant pursuant to the Guidelines. *See* U.S.S.G. §1B1.3(a)(1) (sentencing court may consider all conduct that occurred during the commission of the offense of conviction for which the defendant would be otherwise accountable).

Finally, the amended application note accompanying §4B1.2 contains language that seems expressly to authorize sentencing courts to find crimes of violence even where the offense does not "by its nature" impose a serious risk of physical injury. *See* U.S.S.G. §4B1.2, comment. (n.2) (courts may look to "conduct set forth in the count of which the defendant was convicted" in

[footnote continued]

B. Possession of a Firearm by a Felon as a "Crime of Violence"

We must next consider, then, whether possession of a firearm by a convicted felon constitutes a "crime of violence" because the offense "by its nature present[s] a serious potential risk of physical injury to another." We believe it does.

The Ninth Circuit has already concluded that, under the earlier version of section 4B1.2 and its application notes, "the offense of being a felon in possession of a firearm by its nature poses a substantial risk that physical force will be used against person or property." *United States v. O'Neal*, 910 F.2d 663, 667 (9th Cir. 1990). In support the *O'Neal* court looked to the legislative history underlying 18 U.S.C. §922(g),[4] including a statement by the original sponsor of that legislation to the effect

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deciding whether offense "presented a serious potential risk of physical injury to another") U.S.S.G. §4B1.2, comment. (n.2).

For these same reasons, the courts that have interpreted §4B1.2 and its application notes – as amended – have allowed sentencing courts in some circumstances to look beyond the generic, categorical definition of an offense to the particular facts "set forth in the count of which the defendant was convicted." *See United States v. John*, 936 F.2d 764 (3d Cir. 1991); *United States v. Cornelius*, 931 F.2d 490, 492-93 (8th Cir. 1991); *United States v. Walker*, 930 F.2d 789, 793-94 (10th Cir. 1991); *United States v. Tidswell*, 767 F.Supp. 11 (E.D. Me. 1991); *United States v. Coble*, 756 F.Supp. 470, 474 (E.D. Wash. 1991); *United States v. Hernandez*, 753 F.Supp. 1191, 1196 (S.D.N.Y. 1990).

[4] In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court similarly relied on legislative history to clarify what burglary-related offenses Congress intended to be included as "crimes of violence" when it specifically listed "burglary" as a violent crime for purposes of enhancing sentences pursuant to 18 U.S.C. §924(e). *See id.* at ___ , 110 S.Ct. at 2149-54.

that felons "may not be trusted to possess a firearm without becoming a threat to society." *Id.* (quoting 114 Cong. Rec. 14,773 (1968) (statement of Sen. Long)).

In a similar way, another court decided that, in the context of a pretrial detention hearing, illegal firearm possession by a felon always amounts to a "crime of violence," as defined by the Bail Reform Act.[5] *United States v. Jones,* 651 F.Supp. 1309 (E.D.Mich. 1987). The court in *Jones* offered four independent justifications for its conclusion that the offense of weapons possession by a felon "by its nature" involves a "substantial risk of physical force": (1) felons are more likely to use firearms in an irresponsible manner; (2) felons are acutely aware that such activity is illegal, making the act of weapons possession a knowing disregard for legal obligations imposed upon them; (3) felons are more likely to commit crimes, enhancing the likehlihood the weapon will be used in a violent manner; and (4) illegal weapons possession is an ongoing offense that often is not ended voluntarily, but only through law enforcement intervention, thus "[t]he character of the crime cannot be measured solely as of the moment of discovery and arrest." *Jones,* 651 F.Supp. at 1310. *See also United States v. Phillips,* 732 F.Supp. 255, 262-63 (D.Mass. 1990); *United States v. Johnson,* 704 F.Supp. 1398 (E.D.Mich. 1988).

We find further support for the conclusion that the offense of weapons possession by a felon "by its nature"

---

[5]The Bail Reform Act defines "crime of violence" in part as follows:

> . . . any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the couse of committing the offense.

18 U.S.C. §3156(a)(4).

imposes a "serious potential risk of injury" in the legislative history behind 18 U.S.C. §924(e), which streamlined the categories of persons unqualified to receive or possess firearms and established a stiff mandatory minimum punishment.[6] Section 924(e) was included as part of the Federal Firearms Owners Protection Act of 1986, which relaxed federal rules regarding private sales of firearms among sportsmen and collectors while simultaneously "enhanc[ing] the ability of law enforcement to fight *violent crime* and narcotics trafficking." H.R.Rep. No. 495, 99th Cong., 2d Sess. 1 (1986), U.S.Code Cong. & Admin. News 1986, 1327 (report from House Committee on the Judiciary) (emphasis added). Introducing the measure on the floor of the Senate, its sponsor Senator McClure outlined what he considered unduly aggressive federal enforcement of private weapons sales among collectors and sportsmen, and concluded, "We need to redirect law enforcement efforts away from what amounts to paperwork errors and *toward willful firearms law violations that will lead to violent crime; for example,* selling stolen guns, or *selling firearms to prohibited persons.*" 131 Cong.Rec. S9102 (daily ed. July 9, 1985) (statement of Sen. McClure) (emphasis added); *see also id.* at 9113 (statement of Sen. Laxalt) ("[This act] seeks to direct law enforcement efforts toward those firearms transactions most likely to contribute to *violent crime.*") (emphasis added); 131 Cong.Rec. S8700 (daily ed. June 24, 1985) (statement of Sen. Matsunaga) ("Handguns insofar as I am concerned, . . . are intended for use for one purpose only; that is to kill other human beings.

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[6]Defendant's indictment count for weapons possession alleged violations of both 18 U.S.C. §922(g) and 18 U.S.C. §924(e).

Whatever controls we can impose upon the sale and distribution of those weapons of death, I say let us go to it. I am relieved by the language of S.49 to the extent that it prohibits firearm and ammunition possession, receipt, or transportation in commerce by convicted felons....").

Like the legislative body that criminalized weapons possession by convicted felons, we conclude that defendant's offense of conviction "by its nature" imposed a "serious risk of physical injury," whether or not injury results at the exact moment of arrest or anytime during defendant's ongoing possession of the firearm.[7] Because this offense always constitutes a "crime of violence," a convicted felon found guilty of firearms possession is automatically subject to sentence enhancement under the career offender provisions of the Sentencing Guidelines. A sentencing court need not look to the "conduct set forth in the count from which the defendant was convicted," if such an inquiry is permissible,[8] to determine whether a "crime of violence" has been committed.

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[7] In reaching this result, we are unconstrained by dicta in the recent panel opinion in *United States v. Briggman*, 931 F.2d 705 (11th Cir. 1991) (non-argument calendar). In *Briggman*, a panel of this court upheld an upward departure from the Guidelines in a case involving a conviction for weapons possession by a felon. By way of explaining the district court's decision to apply the Armed Career Criminal Act instead of the career offender guidelines for purposes of sentence enhancement, the panel said, "[T]he career offender provisions do not apply in this case because [the defendant's] crime was not one of violence." *Id.* at 710. The words of an opinion are not, in themselves, the holding of the case; the decision and the facts define a case's precedential authority. In *Briggman*, the defendant was sentenced pursuant to the Armed Career Criminal Act, not the career offender provisions of the Sentencing Guidelines. Because the excerpted statement – when read in context – was unnecessary to the outcome and was merely an explanation for an action by the district court that was unchallenged on appeal, we are not bound by the language cited from *Briggman*.

[8] *See supra* section II(A)(2).

C. Ex Post Facto Application

Defendant contends that application of section 4B1.2, as amended *after* his offense but *before* sentencing, violates the constitutional protection against ex post facto laws. As noted *supra*, we are bound as a general matter by the specific instruction from Congress to consider the Sentencing Commission's guidelines and policy statements "that are in effect on the date the defendant is sentenced." 18 U.S.C. §3553(a)(5); *see also United States v. Russell*, 917 F.2d 512, 514 n.2 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1427, 113 L.Ed.2d 479 (1991); *United States v. Marin*, 916 F.2d 1536, 1538 & n.2 (11th Cir. 1990) (per curiam); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 546 n.3 (11th Cir. 1990).[9] This circuit has made an exception, however, where the effect of applying an amended guideline "would be to subject a defendant to an increased sentence." thereby implicating the Constitution's prohibition on laws having ex post facto consequences. *United*

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[9] The panel opinion in *United States v. Simmons*, 924 F.2d 187 (11th Cir. 1991), is not to the contrary. In that case, the panel acknowledged the passage of a new guideline that would have covered the offense charged, but the panel did not apply the guideline, ostensibly because "only those guidelines in effect at the time appellant committed the offense are applicable in sentencing appellant." *Id.* at 189 n. 1 (citing *United States v. Bradley*, 905 F.2d 359, 360 (11th Cir. 1990)). The offense in *Simmons* was committed in November 1988, and according to the briefs in that case, the defendant was sentenced in September 1989. But, the new guideline at issue did not take effect until November 1990, more than a year *after sentencing*. As a result, *Simmons* is consistent with the general rule that sentencing courts are to apply the guidelines and policy statements in effect at the time of *sentencing*. The case relied upon by the *Simmons* panel supports this conclusion. In *United States v. Bradley*, the panel held that amendments to the guidelines taking effect *after sentencing* were inapplicable. *See Bradley*, 905 F.2d at 360.

States v. Worthy, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990) (citing *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987)).

Defendant argues that under the *Gonzalez-Lopez* precedent, discussed *supra*, we would have been limited to a "categorical analysis of the offense of conviction to determine whether it constitutes a "crime of violence" for career offender purposes. *See Gonzalez-Lopez*, 911 F.2d at 547 (offense is considered "crime of violence" if it "typically present[s] the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs"). But, our conclusion that illegal firearm possession by a felon " 'by its nature' impose[s] a 'serious risk of physical injury,' whether or not that risk materialized at the exact moment of arrest, or anytime during defendant's ongoing possession of the firearm" also satisfies the *Gonzalez-Lopez* standard. Defendant's sentence was not enhanced as a result of our application of the newer guidelines and application notes; the Ex Post Facto Clause is not implicated.

III.

Because defendant's instant conviction for weapons possession by a felon is a "crime of violence," as defined in section 4B1.2 and its application notes, the district court properly enhanced defendant's sentence under the career offender provisions of the Sentencing Guidelines. We AFFIRM.

APPENDIX G

UNITED STATES of America
Plaintiff-Appellee.

v.

Terry Lynn STINSON, Defendant-Appellant.

No. 90-3711.

United States Court of Appeals,
Eleventh Circuit.

March 20, 1992.

Defendant was convicted in the United States District Court for the Middle District of Florida, No. 90-6-Cr-J-14, Susan H. Black, Chief Judge, of various offenses, including bank robbery and possession of a firearm by a convicted felon, and was sentenced under career offender provisions of the Sentencing Guidelines. Defendant appealed. The Court of Appeals, 943 F.2d 1268, affirmed, and defendant petitioned for rehearing. The Court of Appeals held that Sentencing Commission's amendment to Sentencing Guidelines' commentary, stating that offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, was not binding on Court of Appeals until Congress amended language of Guidelines to exclude specifically possession of firearm by a felon as a "crime of violence."

Rehearing denied.

William M. Kent, Asst. Federal Public Defender, Jacksonville, Fla., for defendant-appellant.

Ronald T. Henry, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING

Before EDMONDSON, Circuit Judge, DYER and JOHNSON, Senior Circuit Judges.

[814] PER CURIAM:

This case is before us on a petition for rehearing. Appellant, Terry Lynn Stinson, argues that the Sentencing Commission's recent amendment to the commentary to U.S.S.G. §4B1.2, which states that the offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, is retroactive and applicable to appellant's sentence.

We earlier determined that the law that was in effect when appellant was sentenced was that possession of a firearm by a convicted felon was categorically a "crime of violence." *United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1991). We were not alone in this interpretation of Guidelines §4B1.2. At least four other circuits have held that, for sentencing purposes, firearms possession by a convicted felon either is a crime of violence or, at least, could in some circumstances be considered a crime of violence. *See United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1990) (holding that offense of possession of firearm by a felon is "crime of violence" within the meaning of Guidelines §4B1.2); *see also United States v.*

Alvarez, 914 F.2d 915 (7th Cir. 1990) (applying a "facts of the case" analysis for whether or not possession of firearm by felon is crime of violence); *United States v. Goodman*, 914 F.2d 696 (5th Cir. 1990) (same); *United States v. Williams*, 892 F.2d 296 (3d Cir. 1989) (same). Before the Commission amended the commentary, no circuit court had concluded that section 4B1.2's term "crime of violence" excluded the offense of unlawful possession of a firearm by a felon.[1]

The Commission's alteration consisted of the following sentence, which was added to section 4B1.2's commentary: "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." United States Sentencing Comm'n, Guidelines Manual, Ch. 4, Pt. B, comment., n. 2 (Nov. 1, 1991). The Substance of the Commission's change in the commentary runs directly counter to the substantial volume of precedent interpreting section 4B1.2.

The Commission's amendment did not alter the actual text of section 4B1.2; instead, it merely changed the commentary. The text of section 4B1.2 was exactly the same in October 1989, when appellant committed his offense, as it is now. When we are faced with the question of whether we should reverse our decision and also ignore precedent from other circuits because of a change in guideline commentary, it is crucial to examine closely the appropriate weight to be afforded to the commentary.

---

[1] Since the amendment, two circuits have relied, in part, on the amendment to the commentary to conclude that a crime of violence does not include "possession of a firearm by a felon." *See United States v. Fitzhugh*, 954 F.2d 253 (5th Cir. Jan. 28, 1992); *United States v. Johnson*, 953 F.2d 110 (4th Cir. 1991).

The Sentencing Reform Act of 1984, which authorized the guideline system, tells the courts to consider pertinent policy statements issued by the Sentencing Commission that are in effect on the date the defendant is sentenced. 18 U.S.C. §3553(a)(5). The Guidelines themselves contain a section which specifically addresses the question of what weight is to be given the commentary; U.S.S.G. §1B1.7 states that "commentary is to be treated as the equivalent of a policy statement." The commentary to section 1B1.7 in turn states that "the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." U.S.S.G. §1B1.7, comment.

In general, courts only turn to legislative history when a statute is ambiguous on its face. *See Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). In this case, because section 4B1.2's term "crime of violence" was less than clear, we looked to the commentary to clarify the meaning of "crime of violence." But, when we originally interpreted this section, the commentary was silent about whether possession of a firearm by a felon was to be included as a "crime of violence." This new commentary coming after we had construed the guidelines, raises the question of what effect should be given a post hoc change in the commentary—or newly created "legislative history"—by the Sentencing Commission.

A brief review of the Sentencing Guidelines enactment procedures seems appropriate. After the Sentencing Commission's initial guidelines were submitted to Congress, and after the prescribed period of congressional review, the guidelines took effect on November 1, 1987. The Commission has the authority to submit guideline amend-

ments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. §994(p). Yet, the commentary is never officially passed upon by Congress. According to the enabling statute, Congress is only charged with reviewing the amendments to the guidelines.[2] If there is no change to a particular guideline, but the Commission alters that section's commentary, there is no evidence that Congress reviews it or is even notified of the alteration.[3]

Therefore, we must be mindful of the limited authority of the commentary. We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts. As far as we can tell, at no point has this change been called to Congress's attention, much less, been authorized by Congress. Although commentary should generally be regarded as persuasive, it is not binding. *See United States v. Elmendorf*, 945 F.2d 989 (7th Cir. 1991); *United States v.*

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[2] *See* 28 U.S.C. §994(p). We assume that the commentary does not go through the same intensive review process as the guidelines themselves, for if they did share the same procedure, there would be no basis for a distinction between the guidelines and the commentary; and there would be no reason for them to exist separately or to have the different weight which the guideline commentary, itself, says exists.

[3] In upholding the constitutionality of the guidelines in the face of a constitutional challenge based on excessive delegation of legislative power grounds, the Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 666, 102 L.Ed.2d 714 (1989), stated that "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines. . . ." We note, however, that there is no mention that Congress has the power to amend directly the guidelines' commentary which we see as uniquely the Commission's work product.

Pinto, 875 F.2d 143, 144 (7th Cir. 1989). We decline to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a "crime of violence."[4]

Therefore, we stand by our original interpretation of section 4B1.2: that possession of a firearm by a felon inherently constitutes a "crime of violence." Accordingly, appellant's sentence is affirmed and the motion for rehearing is DENIED.

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[4]Of course, it would be equally satisfactory if the Commission changed the text of the guidelines to exclude firearm possession and submitted the altered text for congressional review during the prescribed period. *See* 28 U.S.C. §994(p). This practice would ensure that Congress passes upon the amendment and that there is no improper delegation of legislative power. *See Mistretta*, 488 U.S. at 394-395, 109 S.Ct. at 666.

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

November 9, 1992

William Mallory Kent, Esq.
Assistant Federal Public Defender
311 West Monroe Street
Suite 318
Jacksonville, Florida 32201

Re: 91-8685 – Terry Lynn Stinson v. United States

Dear Mr. Kent:

The Court today entered the following order in the above stated case:

> "The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted, limited to the following question: "Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under USSG Section 4B1.1, see USSG Section 4B1.2 comment. (n. 2), constitutes an 'incorrect application of the sentencing guidelines' under 18 U.S.C. Section 3742(f) (1)."

Enclosed are Memoranda describing the time requirements and procedures under the Rules, together with a Specification Chart for your use.

Please note that this case will be argued in the March Session. Requests for extensions of time to file briefs on the merits *are not favored*. The deferred appendix method may not be used.

Since the petitioner is proceeding *in forma pauperis*, we will meet the costs of printing the joint appendix and the printing of petitioner's brief. However, it is your obligation to submit the copy to use in proper form to send to the printers.

After you have reached an agreement with opposing counsel as to the contents of the joint appendix, you should immediately prepare a manuscript copy of the joint appendix and submit it to this office to be printed. Please number the pages of the joint appendix to insure proper order. When submitting xeroxed material, please be sure that it is a clear and legible copy. Printed copies will be forwarded to you and opposing counsel as soon as they are available.

In the meantime, you can be working on your brief. As soon as you receive the printed copies of the joint appendix, you may then insert in your brief the proper printed page references to the joint appendix before forwarding your brief to this office to be printed. The typewritten copy of your brief should reach this office no later than December 23, 1992, for printing. You should also serve a typewritten copy of your manuscript brief on opposing counsel.

The printer will provide you with a galley for proofreading and insertion of page citations. When you receive this galley from the printer you should begin work on it

immediately and return it to the printer as soon as possible. The proofreading is only to correct any printer errors and no substantive changes can be made in your brief. This office will forward you printed copies of your brief and serve copies on opposing counsel.

These are the only expenditures paid by this office, unless appointment of counsel is made by this Court. If you desire to be considered for appointment by this Court, you should forward to this office a typewritten motion for such appointment pursuant to Rule 39. I wish to advise that if you do file the motion, the Court may not necessarily appoint counsel who argued the case below.

If no motion for appointment of counsel is filed within two weeks after the Court accepts a case for review, this office will assume that no such motion will be filed.

If we can be of any assistance to you in this matter, please feel free to call upon us.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Assistant Clerk

No. 91-8685

In The

Supreme Court of the United States

October Term, 1992

TERRY LYNN STINSON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE PETITIONER

WILLIAM MALLORY KENT
Assistant Federal Public Defender
311 West Monroe Street, Room 318
Jacksonville, Florida 32202
(904) 232-3039

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under U.S.S.G. Section 4B1.1, see U.S.S.G. Section 4B1.2 comment. (n.2), constitutes an "incorrect application of the sentencing guidelines" under 18 U.S.C. Section 3742(f)(1).

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit denying the petition for rehearing is reported at 957 F.2d 813 (J.A. p. 97a), and the opinion of the Court of Appeals for the Eleventh Circuit affirming petitioner's sentence is reported at 943 F.2d 1268 (J.A. p. 85a)

JURISDICTION

The petitoner, **TERRY LYNN STINSON**, was prosecuted by indictment in the United States District Court, for the Middle District of Florida, for violation of Title 18 U.S.C. §2113(a) and (d), Title 18 U.S.C. §922(g), §924(a)(2) and §924(e), Title 18 U.S.C. §924(c), Title 26 U.S.C. §5861(d) and §5871, and Title 18 U.S.C. §2312 (J.A. p. 4a). Stinson pled guilty to all charges (J.A. p. 9a) and was sentenced on July 6, 1990 (J.A. pp. 14a).

Stinson appealed his sentence to the Eleventh Circuit Court of Appeals invoking the Court's jurisdiction under Title 18 U.S.C. §3742(a)(2) and (3) as well as Title 28 U.S.C. §1291 (J.A. p. 2a). Stinson's sentence was affirmed by the Eleventh Circuit Court of Appeals in an opinion rendered on October 4, 1991. Stinson's petition for rehearing was denied in an opinion entered on March 20, 1992. The petition for writ of certiorari was filed on June 18, 1992 and was granted on November 9, 1992 (J.A. p. 103a). The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under Title 28 U.S.C. §1254(1).

SENTENCING GUIDELINE PROVISIONS INVOLVED

U.S.S.G. §§2K2.1, 4B1.1, 4B1.2, 4B1.2 comment. (n.1), 4B1.2 comment. (n.2), and 4B1.4

STATEMENT

On October 31, 1989, at approximately 12:00 p.m., the Petitioner, Terry Lynn Stinson, entered Sun Bank located at 344 Monument Road, Jacksonville, Florida and approached one of the customer service employees. He demanded money from the bank employee and stated that if she did not comply he would throw what appeared to be a hand grenade in her lap. The customer service employee then escorted him to one of the teller windows where she instructed the teller to give him the money. The teller took the money out of the cash drawer and placed it on the counter. Mr. Stinson then handed the employee a plastic bag and told her to put the money in it. During the confrontation, Mr. Stinson displayed a sawed-off shotgun and also pointed it at the customer service representative's face.

Mr. Stinson stated to the employees that he did not want any dye packs or bait money and also stated that he wanted the money from the drive through cash drawers. A dye pack was placed in Mr. Stinson's bag, but it failed to activate.

After obtaining the money, Mr. Stinson ordered everyone in the bank to lie down. As he was leaving the bank, he threw the hand grenade that he had in his hand onto the floor. He fled the bank, traveling in a white

Chevrolet pick-up truck. A total of $9,427.00 in United States currency was taken in the robbery.

Subsequent investigation determined that the hand grenade used by Mr. Stinson was not armed. During the robbery, Mr. Stinson had in his possession a portable, hand held police scanner. Mr. Stinson's get-away vehicle was located by the police at 355 Monument Road in the Regency Lake Apartment Complex. Located in the back of the truck was an explosive device, constructed from PVC pipe, concrete, stereo speaker wires and other components. The area was evacuated and the Navy Explosive Ordinance Demolition Team was called to the scene and subsequently rendered the device harmless. The sawed-off section of the barrel of the shotgun used by Mr. Stinson in the bank robbery was also found in the back of the truck.

Subsequent to the bank robbery, it was reported to the Jacksonville Sheriff's Office that Mr. Stinson had accompanied a car salesman for Mike Davidson Ford on a test drive of a 1985 Ford van. During the test drive, Mr. Stinson took the car salesman, by gun point, to Woodcreek Apartments, 401 Monument Road, where Mr. Stinson resided. While in the apartment, Mr. Stinson restrained the car salesman with a pair of handcuffs and rope. Additionally, he told the salesman, Mr. Dorminey, that he had rigged a bomb in the apartment, which would go off if Mr. Dorminey left the closet where he was confined. Mr. Stinson then left his apartment driving the white pick-up truck and proceeded to Sun Bank where the robbery was committed. After the robbery, the defendant then returned for the Ford van, leaving the pick-up truck behind.

It was later reported by the car salesman that Mr. Stinson displayed a Florida identification at the car dealership, which reflected his true identity.

After the robbery, Mr. Stinson left Jacksonville, Florida traveling in the stolen Ford van. He traveled to Walt Disney World, in Orlando, Florida for a brief vacation on the day of the robbery. The following day, he traveled to Gulfport, Mississippi, where he was arrested on November 3, 1989. The Chevrolet pick-up truck which was used during the bank robbery was stolen from Cox Pools, Tallahassee, Florida, Mr. Stinson's former employer. The vehicle was reported stolen on October 6, 1989.

On January 10, 1990, a five count indictment was filed by a Middle District of Florida Grand Jury charging Terry Lynn Stinson, the Petitioner herein, with armed bank robbery, various firearm violations, including possession of a firearm by a felon (subject to the armed career criminal provision), and interstate transportation of a stolen motor vehicle. Count One charged Mr. Stinson with bank robbery on October 31, 1989, at Jacksonville, Florida, in violation of Title 18 U.S.C. §2113(a) and (d). Count Two charged that on October 31, 1989, having been previously convicted of a felony offense, Mr. Stinson possessed a firearm, in violation of Title 18 U.S.C. §922(g), §924(a)(2), and §924(e) (Armed Career Criminal Act). Count Three charged that on October 31, 1989, Mr. Stinson did knowingly use and carry a sawed-off shotgun during, and in relation to, a crime of violence, that is, bank robbery, in violation of Title 18 U.S.C. §924(c). Count Four charged that on October 31, 1989, Mr. Stinson possessed a sawed-off shotgun which was not registered to him in the National Firearms Registration and Transfer

Record, in violation of Title 26 U.S.C. §5861(d) and §5871. Count Five charged that on or about October 31, 1989, to on or about November 3, 1989, Mr. Stinson transported in interstate commerce, a stolen 1985 Ford van from Jacksonville, Florida, to Gulfport, Mississippi, in violation of Title 18 U.S.C. §2312. The Federal Public Defender for the Middle District of Florida was appointed to represent Mr. Stinson on January 29, 1990 and William Mallory Kent, Assistant Federal Public Defender filed an appearance on behalf of Mr. Stinson.

On April 11, 1990, Mr. Stinson entered a plea of guilty to Counts One through Five.

The Pre-Sentence Investigation Report determined that Mr. Stinson was a career offender pursuant to Sentencing Guidelines §4B1.1, choosing among his five counts of conviction as the "instant offense conviction" the charge of possession of a firearm by a convicted felon, the penalty for which was enhanced under the armed career criminal provisions of Title 18 U.S.C. §924(e) to life in prison, concluding that the charge of possession of a firearm by a felon was a crime of violence. Based on the career offender provision, with the predicate offense having a maximum penalty of life in prison, the base offense level was 37 and criminal history category was VI, with a guideline range of 360 months to life in prison.[1]

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[1] The description of the offense conduct and statement of facts up to this point has been taken from the Presentence Investigation Report, which is under seal in the district court record.

At the sentencing hearing, counsel for Mr. Stinson repeated the objection previously made to the United States Probation Office that possession of a firearm by a felon, if the offense was committed prior to November 1, 1989, was not a "crime of violence" under Guideline Section 4B1.1 [which defines the term by incorporating the definition of "crime of violence" under Title 18, U.S.C. §16], and could not be the predicate offense to trigger the career offender provisions of Guideline Section 4B1.1. (J.A. pp. 35a-38a)

The District Court ruled against Mr. Stinson as to his objection. The District Court then determined the base offense level to be 37, reduced that level two levels for "acceptance of responsibility" for a total offense level of 35, category VI, and a sentencing range of 292-365 months. The District Court sentenced Mr. Stinson to 365 months, plus a minimum mandatory consecutive five (5) years for use of a firearm during the commission of a crime of violence (Title 18 U.S.C. §924(c)). (J.A. pp. 44a-50a) That sentence was affirmed by the Eleventh Circuit on October 4, 1991.

Subsequent to the issuance of the first Stinson opinion on October 4, 1991, the United States Sentencing Commission issued an amendment to the Commentary to Sentencing Guideline §4B1.2, specifically addressing the issue in this brief. That amendment, which became effective on November 1, 1991, clarified the intent of the Sentencing Commission that the term "crime of violence" (as used in the career offender provision §4B1.1) does not include the offense of unlawful possession of a firearm by a felon. This clarifying amendment was the basis for a petition for rehearing and rehearing *en banc*. The Eleventh

Circuit denied the petition for rehearing in an opinion issued on March 20, 1992. Thereafter, the petition for rehearing *en banc* was denied, and the petition to this Court followed.

SUMMARY OF THE ARGUMENT

The teaching of *Williams v. United States*, 112 S.Ct. 1112 (1992), is that an error in interpreting a policy statement that prohibits a district court from taking a specified action could lead to an incorrect determination of the appropriateness of a departure. In that event, the resulting sentence would be one that was "imposed as a result of an incorrect application of the sentencing guidelines" within the meaning of 18 U.S.C. §3742(f)(1). Commentary can rightly be said to have the same legal significance as policy statements. Therefore, the failure to follow the specific direction of U.S.S.G. §4B1.2 comment. (n.2), that the offense of possession of a firearm by a felon is not a "crime of violence" under U.S.S.G. §§4B1.1 and 4B1.2, when that failure results in the application of a guideline that should not be applied, causes a misapplication of the guidelines under 18 U.S.C. §3742(f)(1).

An analysis of the structure of the related guidelines, §§2K2.1, 4B1.1, 4B1.2 and 4B1.4, reveals that a failure to follow the specific direction of U.S.S.G. §4B1.2 comment. (n.2), renders §§2K2.1(a)(1), 2K2.1(a)(2) and 4B1.4 nugatory. That is, to treat a "felon-in-possession" offense as a crime of violence punishable as a career offender under 4B1.1, results in the other sections never being applied.

For example, §4B1.4 was adopted to apply only to armed career criminals under 18 U.S.C. §924(e).[2] Armed career criminals are "felons-in-possession" with three prior crimes of violence. A career offender is an offender whose current crime is a "crime of violence," and who has two prior crimes of violence. If being a "felon-in-possession" qualifies as a "crime of violence," then every armed career criminal will also be a career offender. Because the guidelines require the higher of the two applicable guidelines to control, armed career criminals would never be sentenced under the guideline created especially and solely for them, but would always be sentenced under the higher career offender guideline. Such an interpretation of the definition of "crime of violence" renders the Congressionally approved guideline §4B1.4 invalid. By generally accepted rules of statutory construction such an interpretation must be wrong.

Sentencing Commission commentary is analogous to administrative agency rules, which must be deferred to by the courts so long as they are not plainly inconsistent with the Congressional grant of authority. In this case, only by following the direction of the commentary, can the broader guideline framework of interrelated guidelines be given practical effect. Therefore, the court must defer to this commentary, and to fail to do so results in a misapplication of the guidelines.

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[2] Stinson's instant offense count used for enhancement under §4B1.1 was a §924(e) count.

ARGUMENT

I. Background

Section 4B1.1 of the Sentencing Guidelines provides:

> "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

Stinson did not contest element (1), that he was over eighteen at the time of the offense, or (3), that he had been twice convicted of crimes of violence. Stinson argued below that the offense used in his case as the predicate "instant offense of conviction," was not a "crime of violence," according to both (1) the commentary interpreting and guiding the application of U.S.S.G. §4B1.2, and (2) the guideline itself.

Stinson's conviction for possession of a firearm by a felon was chosen by the sentencing court as the predicate instant offense, holding over Stinson's objection, that possession of a firearm by a felon is a "crime of violence," as that term is defined in section 4B1.2 of the Sentencing Guidelines.[3]

---

[3] Because Stinson had *three* prior violent felonies, he was subject to a minimum mandatory fifteen years to life imprisonment for conviction on the possession of a firearm charge, under Title 18, §924(e) (Armed Career Criminal Act). Stinson agreed that he was a career offender, but only by using his armed bank robbery conviction (Title 18, §2113(a) and (d)) as the predicate

Stinson's crime occurred on October 31, 1989, and he was sentenced on July 6, 1990. At the time of his offense §4B1.2 defined "crime of violence" to have the same meaning as the definition of crime of violence in Title 18, §16.

However, §4B1.2 was amended effective November 1, 1989, i.e., before Stinson's July 6, 1990 sentencing, to define crime of violence as follows:

> "(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*"[4] (emphasis supplied)

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instant offense. The maximum penalty for armed bank robbery is twenty-five years. Under the career offender provision of the guidelines, the maximum penalty for the predicate instant offense determines the total offense level. The total offense level is thirty-seven for a life offense, but only thirty-four for an offense punishable by twenty-five years.

[4] The definition applicable at the time of the offense (October 31, 1989) was that found at Title 18, §16, which reads:

§16. Crime of violence defined

The term "crime of violence" means –

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

The amended definition was apparently borrowed from the definition of crime of violence used in the Armed Career Criminal Act, Title 18, §924(e). Effective November 1, 1990, new Guideline §4B1.4 was added to expressly cover violations of the Armed Career Criminal Act, making an armed career criminal (a felon in possession with three prior crimes of violence or serious drug offenses), level 34 (or, in some cases, level 33, and a criminal history category of from IV to VI).

In the Application Notes in the Commentary to §4B1.2 effective November 1, *1989*, the Sentencing Commission stated that courts may look to "conduct set forth in the count of which the defendant was convicted," in deciding whether the predicate instant offense "presented a serious potential risk of physical injury to another." (U.S.S.G. §4B1.2, comment. (n.2)). A later amendment effective November 1, 1991, clarified what "conduct" was the focus of the inquiry, by adding "the conduct set forth (*i.e. expressly charged*) in the count of which the defendant was convicted."

Following the Eleventh Circuit's opinion in *United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1992) (*Stinson I*), and without any advance public notice, the Sentencing Commission issued a *clarifying* amendment to Application Note 2 to the Commentary to the Career Offender

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(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

provisions. The note was amended by adding the following language:

> *"The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon.* Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense . . . " (emphasis supplied).[5]

At the same time, but following public notice and submission to Congress, *guideline* §2K2.1 was substantially revised to expressly provide an offense level 24 (and, in some cases, level 26) for a felon in possession who had two prior crimes of violence or serious drug offenses (which, if the offense of "felon in possession" were a "crime of violence," would also fit exactly the career offender definition in §4B1.1, a point which will be discussed *infra*).

This amendment to the *guidelines* was effective November 1, 1991, but the *clarifying* amendment to the existing commentary presumably clarified preexisting

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[5] Post *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992) (*"Stinson II"*) the United States Sentencing Commission submitted to Congress among its 1991 amendments to the Guidelines its previously published change in the commentary at issue here, United States Sentencing Commission, 57 Fed. Reg. 20148, May 11, 1992.

intent, that is, the intent at the time of Stinson's sentencing. And, indeed, the Sentencing Commission expressly made the amendment to U.S.S.G. §4B1.2 comment. (n.2) retroactive under §1B1.10 on August 26, 1992.

Based upon the clarification published by the Sentencing Commission that it did not intend a possession of a firearm offense to constitute a crime of violence for career offender purposes, Stinson petitioned for a rehearing and for rehearing *en banc*.

Stinson's petition for rehearing was denied in *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992) (*Stinson II*), and his petition for rehearing *en banc* was subsequently denied by a memorandum order. In *Stinson II*, the Eleventh Circuit held that it was not bound by the change in U.S.S.G. §4B1.2's *commentary* until Congress amends *guideline* §4B1.2's language to exclude specifically possession of a firearm by a felon as a "crime of violence." For Stinson, this meant that the Eleventh Circuit stood by its original interpretation of §4B1.2 that possession of a firearm by a felon "inherently constitutes a crime of violence," and Stinson's sentence was affirmed and motion for rehearing denied.

The Eleventh Circuit did not discuss this Court's opinion in *Williams*, in declining to be bound by Sentencing Guidelines commentary expressly prohibiting the position it took in interpreting Sentencing Guideline Section 4B1.2.[6]

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[6] The *Williams* opinion was issued after Stinson's petition for rehearing was filed and after the United States filed its response, but before the court issued its opinion denying the

II. The "Williams" Analysis

In *Williams v. United States*, 112 S.Ct. 1112, 1119 (1992), Justice O'Connor, writing for a seven Justice majority, stated:

> "Where, as here, a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline. An error in interpreting such a policy statement could lead to an incorrect determination . . . In that event, the resulting sentence would be one that was 'imposed as a result of an incorrect application of the sentencing guidelines' within the meaning of §3742(f)(1)."

That is, although there is a distinction between "guidelines" and "policy statements" interpreting the guidelines, and it is only an incorrect application of a "guideline" which triggers appellate review under §3742(f)(1), the interpretation of the guideline must be informed by a correct reading of any relevant policy statement.[7] An incorrect interpretation of a policy statement can lead to an incorrect interpretation of the affected guideline, and thus indirectly to a misapplication of the guideline and appellate review under §3742(f)(1).

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petition for rehearing in *Stinson II*. Counsel for Stinson cited *Williams* to the Eleventh Circuit as supplemental authority under Rule 28(j), of the Federal Rules of Appellate Procedure, under cover of a letter dated April 20, 1992, in support of the still outstanding petition for rehearing *en banc*.

[7] *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1732-1733, n.263 (1992).

Although this Court in *Williams* was addressing the significance of misinterpretations of *policy statements* and not *commentary*, commentary can rightly be said to have the same legal significance as policy statements, and hence principles of construction and application applicable to the one are equally applicable to the other. For example, and pertinent to the issue at hand, U.S.S.G. §1B1.7 ("Significance of Commentary") states:

> "The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. *Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. §3742.* Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement . . . "[8] (emphasis supplied)

In Stinson's case, U.S.S.G. §4B1.2, comment. (n.2) directs:

> *"The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon.* Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions

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[8] The commentary to §1B1.7 elaborates: "Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. *These are to be construed as commentary and thus have the force of policy statements.*" (emphasis supplied)

Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. §924(e), §4B1.4 (Armed Career Criminal) will apply." (emphasis supplied)[9]

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[9] On December 31, 1992 the Sentencing Commission published for public comment a preliminary document containing proposed amendments for the 1993 cycle. Among the newly proposed amendments is amendment 61, which provides in pertinent part:

> "The Commentary to Section 4B1.2 is amended in Application Note 2 by deleting the words "does not include" in the first sentence of the second paragraph, and inserting in lieu thereof the word "includes."

The synopsis explains that the amendment is necessary to make it clear that "crime of violence":

> "includes the possession of a firearm by a felon, conduct which is a criminal offense because Congress has determined that such conduct presents a risk of violence."

In a novel introductory note to the entire set of proposed amendments, the Commission explained that:

> "The Commission agreed to publish, upon request of a single Commissioner, any proposal or issue for comment, including all proposals submitted from sources outside the Commission. *Therefore, publication of an amendment for comment does not necessarily indicate that the Commission or any individual Commissioner has formed a view on the merits of the proposed amendment.*" (emphasis added)

In light of the fact that the Commission voted three to one as recently as last August not only to ratify Application Note 2 as it was, but to make its application retroactive, it would not appear likely that the above proposed amendment represents the consensus of the Commission, and accordingly its adoption and submission to Congress appears unlikely.

Not only does the relevant commentary expressly define that possession of a firearm is not a "crime of violence," but it further directs that the applicable guideline will, in such cases, instead be either §2K2.1 or §4B1.4.

The Eleventh Circuit Court of Appeals first interpreted U.S.S.G. §4B1.2's term "crime of violence" before the Sentencing Commission issued the clarifying commentary now at issue.[10] However, following the issuance of the commentary, upon a petition for rehearing and petition for rehearing *en banc*, the Eleventh Circuit refused to reconsider its interpretation and follow this express commentary, holding that it would not be bound by commentary.[11] The opinion in *Stinson II* came out just

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[10] U.S.S.G. App. C (1991) described the changes in the commentary as *clarifying* changes:

> "This amendment clarifies that the application of §4B1.2 is determined by the offense of conviction (*i.e.*, the conduct charged in the count of which the defendant was convicted); *clarifies that the offense of unlawful possession of a weapon is not a crime of violence for the purposes of this section . . .* " (emphasis supplied)

Ironically, the first opinion on Stinson from the Eleventh Circuit defining "crime of violence" relied upon the commentary notes then in effect to reach its holding. Judge Edmondson concluded the opinion stating:

> "Because defendant's instant conviction for weapons possession by a felon is a 'crime of violence,' *as defined in section 4B1.2 and its application notes,* the district court properly enhanced defendant's sentence under the career offender provisions of the Sentencing Guidelines." (emphasis supplied)

[11] The opinion denying rehearing following the issuance of the commentary did not rest on any claimed lack of retroactivity. Under Eleventh Circuit precedent, clarifying commentary added after sentencing will be applied on appeal. *United States*

eleven days after the issuance of this Court's opinion in *Williams*. Neither party below had cited *Williams* before

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v. Gardiner, 955 F.2d 1492 (11th Cir. 1992). In any event, if that were an issue, it was resolved in Stinson's favor by the action of the Sentencing Commission on August 26, 1992 including the amendments to §4B1.2, comment. (n.l), among those given retroactive effect under §1B1.10. *See* 57 Fed. Reg. 42804.

There was language in the second Stinson opinion complaining that there had been no notice nor submission to Congress of the amended commentary. In direct response, the Sentencing Commission issued amendment 461 for submission to Congress in 1992. U.S.S.G. App. C (1992) explains amendment 461:

> "[T]his amendment ratifies a previous amendment to the commentary to §4B1.2 (amendment 433, effective November 1, 1991) and corrects a clerical error in a reference in that commentary to §2K2.1. The previous amendment to the text of Application Note 2 clarified that application of §4B1.2 is governed by the offense of conviction, and that the offense of being a felon in possession of a firearm is not a crime of violence within the meaning of this guideline. As a clarifying and conforming change, the previous commentary amendment reflected Commission intent that the term "crime of violence," as that term is used in §§4B1.1 and 4B1.2, be interpreted consistently with that term as used in other provisions of the Guidelines Manual. For example, §4B1.4, as promulgated by amendment 355, effective November 1, 1990, provides an increased offense level for a "felon-in-possession" defendant who is subject to an enhanced sentence under 18 U.S.C. §924(e) and who used or possessed the firearm in connection with a crime of violence (§4B1.4(b)(3)(A)). This action to ratify a previous commentary amendment was taken because of concerns raised by *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992), in which the court stated it would not follow amendment 433 because the commentary amendment was not submitted to Congress. **The effective date of this amendment is November 1, 1992."**

However, as a clarifying and conforming change in the commentary to §4B1.2, the 1991 amendment stating that felon-in-possession is not a crime of violence was not required to be submitted to Congress under 28 U.S.C. §994(p), which states that only amendments to the guidelines must be submitted to Congress. Yet, as an authoritative statement of Commission intent as to how the career offender guideline is to be interpreted and applied, failure to give effect to this amendment can be reversible error under 18 U.S.C. §3742(f)(1).

the issuance of *Stinson II*, although counsel for Stinson did submit *Williams* as supplemental authority the following month, before the petition for rehearing *en banc* was summarily denied. Had the Eleventh Circuit chosen to discuss *Williams*, what teaching would it have drawn? Perhaps we can approach the application of *Williams* to Stinson best by analyzing the *Williams'* dissent.

The dissent in *Williams* complained that the majority failed to define what the phrase "incorrect application of the guidelines" means. It is true, the majority opinion in *Williams* did not explain the interstitial analytical steps by which one concludes that the failure to abide by a specific prohibition in a policy statement leads to an incorrect determination of the guideline; the omission is understandable, perhaps, if one assumes that such a clearly inconsistent application of the policy statement to the guideline as occurred in *Williams* self-evidently results in a misapplication of the guideline itself. Similarly, in Stinson's case, the misinterpretation of the guideline resulting from the failure to follow the specific direction of the commentary is self-evident.

The dissent, arguably, did not object in principle to the proposition that a *particular* error in interpretation of a policy statement (read, "commentary") could result in a misinterpretation of a particular guideline, and hence a misapplication of that guideline. Justice White wrote, "an error in their [i.e., a policy statement's] interpretation is not, *in itself,* subject to appellate review . . . " *Williams,* at p. 1125 (emphasis added). By implication, if the error in interpretation can be shown to result in an error in interpreting the relevant guideline, review under §3742(f)(1) would come into play. Justice White proceeded to quote from the legislative history to support the dissent's position:

> "It should be noted that a sentence that is inconsistent with the sentencing guidelines is subject to appellate review, while *one that is consistent with guidelines but inconsistent with the policy statements is not.* This is not intended to undermine the value of the policy statements. It is, instead, a recognition that *the policy statements may be more general in nature than the guidelines and thus more difficult to use* in determining the right to appellate review." S.Rep. No.98-225, p. 167 (1983), U.S.Code Cong. & Admin.News 1984, pp. 3182, 3350 (separate emphasis added).

This is not to say that a sentence that is inconsistent with a commentary *and* inconsistent with the affected guideline is not reviewable. Instead, this explains that in principle policy statements (and commentary) will be more general than the specific guideline, and from an analytical point of view, a sentence could be inconsistent with the more general policy statement or commentary, and yet be consistent with the specific guideline; in such a case the perceived "error," i.e., inconsistency, in interpreting the policy statement is not reviewable. Perhaps there

would have been some merit to a narrow interpretation of the Eleventh Circuit's position had the newly issued commentary been less specific and more general.

The dissent in *Williams* then focused on the effect a misinterpretation of a policy statement would or would not have on an applicable guideline range. Finding that in the case of the misinterpretation of the policy statement in *Williams* there was no effect on the applicable guideline range, the dissent argued that Williams was not entitled to relief under §3742(f)(1).

But the rationale of the *Williams* dissent is not applicable to the commentary in Stinson's case. In Stinson's case, the commentary is more specific than the guideline. Unless the commentary is to be disregarded (as the Eleventh Circuit felt it could), there is no way to uphold the interpretation of U.S.S.G. §4B1.2 that possession of a firearm by a felon is a "crime of violence." Failure of the court to follow the commentary in Stinson's case resulted in the application of the guideline range mandated under U.S.S.G. §4B1.1 (Career Offender), which, for an offense with a statutory maximum penalty of life, is level 37, compared to a level 34, had the court followed the commentary, and applied the guideline range mandated under U.S.S.G. §4B1.4 (Armed Career Criminal). Thus, the failure of the court to apply the commentary in Stinson's case *did* affect the applicable guideline range – by three levels.[12]

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[12] Level 37, Category VI, has a range of 360 months to life; Level 34, Category VI, has a range of 262-327 months. However, Stinson received two levels off for acceptance of responsibility under §3E1.1, hence his Total Offense Level fell to Level 35. On

Thus as in *Williams*, by either the majority or dissent's rationale, we would submit that the court's failure to follow the commentary in Stinson's case, specifically directing that the offense of possession of a firearm by a felon is not a crime of violence, constitutes a "misapplication of the guidelines" under 18 U.S.C. §3742(f)(1).[13]

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remand, applying the principle of §1B1.11, Stinson would receive three levels off for acceptance of responsibility under the current version of §3E1.1, and have a Total Offense Level of 31, for a range of 188-235 months.

[13] The court also ignored or misapplied other relevant commentary within application note 2 to §4B1.2, which explained what "conduct" was the subject of examination in determining whether the offense "presents a serious potential risk of physical injury to another" [or, under the language of Title 18, U.S.C. §16, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"]. Both at the time of sentencing, and in a slightly modified version at the time of the opinion denying the petition for rehearing, application note 2 stated in pertinent part:

> "Other offenses are included where . . . (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another . . ."

It is, at least to Petitioner, self-evident that the offense of possession of a firearm by a felon, cannot be, *by its nature*, subject to the risk identified above. *See United States v. Bruce*, 965 F.2d 1000 (11th Cir. 1992) (per curiam), in which two members of the panel stated they would not have adopted the "per se" rule of *United States v. Stinson*.

III. The Structural Analysis[14]

The Eleventh Circuit, in focusing on the one sentence amendment to U.S.S.G. §4B1.2 comment. (n.2) in isolation, ignored the newly added cross-reference to the newly amended *guideline* §2K2.1, and also ignored the addition effective November 1, *1990* of new *guideline* §4B1.4 (Armed Career Criminal).

An armed career criminal is a defendant who violates 18 U.S.C. §922(g) [felon-in-possession] and has three prior convictions for either a crime of violence or a serious drug offense. Before November 1, 1990, and the addition of §4B1.4, there was no guideline for an armed career criminal and armed career criminals were sentenced outside the guidelines under the statutory mandate of a sentence of "not less than fifteen years." Title 18, §924(e). The 1989 guideline statutory index, U.S.S.G. App. A (1989), did not list an applicable guideline for 18 U.S.C. §924(e), whereas the current index in U.S.S.G. App. A (1992) directs the application of §2K2.1 or §4B1.4. In counsel's experience, armed career criminals were *not* sentenced under the career offender guideline,[15] although

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[14] For an excellent structural analysis of the guidelines as they relate to the determination whether "felon-in-possession" is a crime of violence for career offender purposes, see Mary E. McDowell, *Felon-In-Possession: Why It Is Not a "Crime of Violence" under the Career Offender Guideline*, Vol. 5, No. 2, Federal Sentencing Reporter 112 (Sept./Oct. 1992).

[15] *See e.g. United States v. Briggman*, 931 F.2d 705 (11th Cir. 1991), whose opinion, that a felon-in-possession is not a career offender, the panel in *Stinson I* treated as dicta. *See* Toby D. Slawsky, *Career Offender Provisions – What Prior Offenses Count?*, 53 Federal Probation 63, 66 (December 1989).

if one assumes that possession of a firearm by a felon is a crime of violence, then by definition most armed career criminals would also be career offenders.[16]

Guideline §4B1.4 was expressly created for armed career criminals, effective November 1, 1990, establishing their offense level as level 34 (or, in some instances 33) unless either the career offender guideline or Chapter 2 guideline applicable to the conviction, is higher. Under the *Stinson II* court's rationale, however, the armed career criminal guideline would *never* be applied, because under *Stinson I* and *II*, all armed career criminals would also be career offenders (because their instant offense conviction for possession of a firearm will be treated as a crime of violence and automatically trigger the application of the career offender provision), and would invariably face substantially lengthier sentences as career offenders than as armed career criminals.[17] In other words, the Eleventh

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[16] Most, but not all, because (1) the Armed Career Crimina! Act ("ACCA") counts *juvenile* convictions, while the career offender guidelines do not, (2) the career offender provisions exclude convictions after a term of years, whereas the ACCA has no time limits on the use of prior convictions, and (3) the career offender provision excludes non-residential burglaries, whereas the ACCA does not.

[17] Level 37, Category VI based on §4B1.1's career offender offense level for offenses punishable by life – an armed career criminal is punishable by a minimum fifteen years to a maximum of life. Armed career criminals are three, and in some cases, four *levels* lower under §4B1.4, and can range from Category VI down to Category IV under §4B1.4. Thus the spread can be four levels and two categories, which can run from 360 months to life, for career offenders to 188-235 months for armed career criminals. In the case of certain technical exceptions

Circuit's holding in *Stinson I* and *II* renders Guideline §4B1.4 nugatory. Hence the Eleventh Circuit's rationale for its holding – that it was only overriding *commentary*, and a circuit court is not bound by commentary, as opposed to Congressionally mandated *guidelines* – does not withstand scrutiny.

Nor is it only the impact on guideline §4B1.4 at issue in *Stinson I* and *II*. When the Sentencing Commission responded to the series of pre-1991 amendment circuit opinions that possession of a firearm either categorically or on the facts of the case, was a crime of violence, by adding clarifying commentary to the contrary, it also amended (with Congressional approval) pre-existing guideline §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms) to increase the range from level 12 to 24 (and 26 in cases involving firearms listed in 26 U.S.C. §5845(a)) for felons-in-possession who had two prior crimes of violence or controlled substance offenses. Note: this definition corresponds exactly to that set by the Eleventh Circuit for a career offender! Thus under the *Stinson I* and *II* rationales, new guideline §§2K2.1(a)(1) and (2) *would never be applied* because in the Eleventh Circuit such defendants would *always* be career offenders and always subject to an enhanced punishment under §4B1.1 instead.

Thus, the Eleventh Circuit in *Stinson II* has, implicit in its holding, determined that sentencing guidelines §§2K2.1(a)(1), 2K2.1(a)(2) and 4B1.4 will never be

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noted in the preceding footnote, the §4B1.4 ACCA guideline would apply still.

applied.[18] Such a construction of §4B1.1 violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant. *Kungys v. United States*, 485 U.S. 778 (1988). Therefore, the error rests not only upon the failure to follow the specific direction in the commentary to the contrary, but also upon a misapprehension of the broader *guideline* framework. From this statutory construction analysis of the interplay of the related guidelines, it is clear that as to this particular case, and this particular commentary, in this particular context of interrelated guidelines and statutory offenses, that the failure to follow the specific direction in the commentary did in fact result in a misapplication of the guideline itself.

IV. Review of Case Law in the Circuits

Before the issuance of the amended commentary on November 1, 1991, relying on either the pre-November 1989 Title 18, §16 definition, or the later "borrowed" §924(e) definition of crime of violence in guideline §4B1.2, the Third, Seventh, Eighth, and Tenth Circuits held *on the facts of the respective cases* (impliedly, or expressly stating that the offense was not *per se* or categorically a crime of violence), that possession of a firearm by a felon was a crime of violence for career offender purposes. *United States v. Williams*, 892 F.2d 296 (3rd Cir. 1989); *United States v. McNeal*, 900 F.2d 119 (7th Cir. 1990); *United States v. Alvarez*, 914 F.2d 915 (7th Cir. 1990); *United*

[18] Except in the narrow circumstances noted above as to §4B1.4 only.

States v. Cornelius, 931 F.2d 490 (8th Cir. 1991); *United States v. Walker*, 930 F.2d 789 (10th Cir. 1991).[19] In addition, the Fifth, Ninth and Eleventh Circuits each held that possession of a firearm by a felon was *per se*, or categorically, a crime of violence. *United States v. Goodman*, 914 F.2d 696 (5th Cir. 1990); *United States v. Shano*, 947 F.2d 1263 (5th Cir. 1991) (*Shano I*); *United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1990); *United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1991) (*Stinson I*).[20]

Following the Eleventh Circuit's opinion in *Stinson I*, and without any advance public notice, the Sentencing Commission issued the *clarifying* amendment to Application Note 2 to the Commentary to the Career Offender provisions, which is the subject of this brief. The Eleventh Circuit refused to reconsider its opinion following a petition for rehearing which briefed the matter of the

[19] The Seventh Circuit, establishing that possession of a firearm is not categorically a crime of violence also held, in *United States v. Chappel*, 942 F.2d 439 (7th Cir. 1991), that possession was *not* a crime of violence on the facts presented in that case.

[20] There was a debate within these opinions as to whether only the generic offense, or the offense conduct charged in the indictment or the actual underlying conduct could be examined to determine whether a crime of violence had occurred. Arguably this is a sub-issue of the question at hand, but it is counsel's opinion that it is not necessary to reach that question to resolve this case.

The Circuits split on the effect of *Taylor v. United States*, 110 S.Ct. 2143 (1990) on this sub-issue.

clarifying amendment to the commentary in *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992) (*Stinson II*).[21]

However, six other circuits that have been called upon to re-examine the issue since the November 1, 1991 clarifying amendment have held contrary to the Eleventh Circuit, that possession of a firearm by a felon is *not* a crime of violence. *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992); *United States v. Bell*, 966 F.2d 703 (1st Cir. 1992); *United States v. Carter*, ___ F.2d ___, 1992 U.S. App. LEXIS 32517 (2nd Cir. 1992); *United States v. Joshua*, 976 F.2d 844, 850-856 (3rd Cir. 1992)[22]; *United States v. Samuels*, 970 F.2d 1312 (4th Cir. 1992); *United States v. Shano*, 955 F.2d 291 (5th Cir. 1992) (*Shano II*); and *United States v. Sahakian*, 965 F.2d 740 (9th Cir. 1992).[23]

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[21] On May 14, 1992, in *United States v. Adkins*, 961 F.2d 173 (11th Cir. 1992), the Eleventh Circuit reaffirmed *Stinson I* and *Stinson II*.

[22] *Joshua* held that on its facts, the charge did not sustain the application of the career offender provisions. *Joshua* turned on whether the court could look behind the conduct expressly charged in the indictment. Because *Joshua* decided that the amended commentary prohibiting a court from looking to the underlying conduct was not clearly inconsistent with the guideline, the court must give it effect, and based upon the language in the indictment in the particular case, the charge of possession of a firearm by a felon was not a crime of violence. *Joshua* rejected, however, the Commission's attempt in the commentary to prohibit the application of career offender status to possession of a firearm on a *per se* basis, holding that this interpretation could not reasonably be supported by the guideline itself.

[23] *But see, United States v. Alvarez*, 972 F.2d 1000 (9th Cir. 1992), in which no issue was made of using a possession charge as a predicate for the career offender.

In *Sahakian*, the Ninth Circuit went from holding possession of a firearm is categorically a crime of violence (in *O'Neal*) to hold instead that it categorically is *not* a crime of violence. Similarly, the Fifth Circuit, post amendment in *Shano II* reversed its prior holding in *Shano I*.[24] The First Circuit, in *Bell* and *Doe*, has now joined with the new position of the Ninth Circuit in *Sahakian*, that possession of a firearm by a felon is categorically *never* a crime of violence. In the Second Circuit in *Carter*, the government conceded that the commentary mandated a reversal:

> "Effective November 1, 1992, a revision to §1B1.10(d) of the Sentencing Guidelines establishes retroactively that a "felon-in-possession" conviction under §922(g)(1) is never a "crime of violence" for purposes of §4B1.1, 57 Fed. Reg. 42804 (1992), thereby undercutting the government's position. After oral argument and upon learning of this revision, *the government informed this court that it does not oppose remand for resentencing in conformity with this Guidelines amendment*. Accordingly, we remand for resentencing." *Carter, supra*. (emphasis supplied)

The Eighth Circuit, in *United States v. Saffeels*, ___ F.2d ___, 1992 U.S. App. LEXIS 33236 (8th Cir. 1992), declined to reverse *Cornelius*, but noted that this Court had granted certiorari in this case [i.e., Stinson], and rather than overrule a prior panel would leave the ultimate disposition to this Court.[25]

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[24] This Court granted certiorari in *Kyle v. United States*, 112 S.Ct. 2959 (1992), and remanded *Kyle* for resentencing in light of *Shano II* and the amended commentary.

[25] The Sixth Circuit, *in an opinion not certified for publication*, reported as *United States v. Beckley*, 972 F.2d 349 (6th Cir. 1992),

Among all the opinions to date, the only useful analysis of the questions involved is found in *Joshua*. In declining to follow the lead of the Eleventh Circuit, the court in *Joshua* looked first at the role of the Sentencing Commission in the statutory scheme. In addition to promulgating the guidelines, the Commission has a continuing obligation to "review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." *Joshua* at p. 854, quoting 28 U.S.C. §994(o). As this Court stated in *Braxton v. United States*, 111 S.Ct. 1854 (1991), "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* 111 S.Ct. at 1858. *Joshua* concluded that it was clear that the Commission had a part to play when courts, interpreting the same language, reach contrary conclusions.

According to *Joshua*, unless the Commission adopts an interpretive commentary that the text of the guideline cannot reasonably support, the courts should follow the commentary. *Joshua* held that the amendment to the commentary which attempts to prohibit on a *per se* basis application of career offender status to the offense of "felon-in-possession," is not reasonably supported by the

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the unpublished opinion of which, however, can be found at 1992 U.S. App. LEXIS 17473, declined to apply the amendment *retroactively*. *Beckley* was decided on July 22, 1992, one month before the Sentencing Commission acted to make the amendment retroactive.

guideline, and would not be followed by the Third Circuit. On the other hand, the court found the resolution of the question whether courts are permitted to look to underlying conduct to determine whether there had been a crime of violence, which the amendment prohibits, to be an example of commentary clarifying an ambiguity, in which case, the Commission's interpretation must be followed.

The issue is misstated by the Eleventh Circuit, according to *Joshua*, when it frames the issue whether the Commission has the authority to overturn circuit court precedent. Obviously not, and yet the Commission is authorized to interpret the guidelines without going through Congress. 28 U.S.C. §994(p) (requiring that the Commission submit to Congress only amendments to the guidelines themselves). Thus the issue is analogous to that faced by courts in responding to an administrative agency's interpretation of an ambiguous statute. Normally, courts give deference to such interpretations. And the case is more compelling with the guidelines, because the Commission is the entity that initiates the guidelines in the first place. Thus, so long as the Commission's interpretation of a guideline is a permissible reading of the guideline, courts should defer to it, and if this means reconsidering a prior panel's decision, so be it.

Of course, a major criticism that can be made of *Joshua's* application of its reasoning to the issue at hand, is that in analyzing §4B1.1 in isolation, it completely failed to consider the interplay of guideline §§2K2.1, 4B1.1 and 4B1.4. An analysis of that interplay – a structural analysis – makes clear that the courts have been in

error in consistently applying §4B1.1 to felons-in-possession, and it is the courts, not the Sentencing Commission, which have interpreted the guideline in a way which cannot be supported by an analysis of the guideline in context. With this knowledge, but applying the reasoning of *Joshua*, we would argue that it is error for a court to fail to give deference to commentary that is clearly consistent with the overall framework and purpose of the relevant guidelines.

Where this leaves the issue in the circuits is that only the Eleventh and Eighth Circuits continue to hold, alone among all nine circuits that have considered the issue, in the face of Sentencing Commission commentary expressly and directly contradicting its position, that possession of a firearm by a felon is always and in every case, regardless of the conduct charged in the indictment or the actual underlying conduct, a crime of violence for purposes of the Career Offender provision.

CONCLUSION

Based on the analysis of *Williams* and a structural analysis of the interrelated guidelines, Petitioner Stinson submits that the court's failure to follow the specific direction of the commentary that possession of a firearm by a felon was not a crime of violence, resulted in a misapplication of the guidelines under 18 U.S.C. §3742(f)(1).

WHEREFORE, Petitioner, *TERRY LYNN STINSON*, respectfully prays this Honorable Court vacate his sentence and remand the case for resentencing with instructions that he be resentenced as an armed career criminal under U.S.S.G. §4B1.4.

Respectfully submitted,

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APPENDIX

2. FIREARMS

§ 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition.

(a) Base Offense Level (Apply the Greatest):

(1) **26,** if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(2) **24,** if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or

(3) **22,** if the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(4) **20,** if the defendant –

(A) had one prior felony conviction of either a crime of violence or a controlled substance offense; or

(B) is a prohibited person, and the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(5) **18,** if the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(6) **14,** if the defendant is a prohibited person; or

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), or (m).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	Number of Firearms	Increase in Level
(A)	3-4	add **1**
(B)	5-7	add **2**
(C)	8-12	add **3**
(D)	13-24	add **4**
(E)	25-49	add **5**
(F)	50 or more	add **6**.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved a destructive device, increase by **2** levels.

(4) If any firearm was stolen, or had an altered or obliterated serial number, increase by **2** levels.

Provided, that the cumulative offense level determined above shall not exceed level **29**.

(5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm of ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply –

(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: *18 U.S.C. §§ 922(a)-(p), (r), 924(a), (b), (e), (f), (g); 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).*

Application Notes:

1. *"Firearm" includes (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. See 18 U.S.C. § 921(a)(3).*

2. *"Ammunition" includes ammunition or cartridge cases, primer, bullets, or propellent powder designed for use in any firearm. See 18 U.S.C. § 921(a)(17)(A).*

3. *"Firearm listed in 26 U.S.C. § 5845(a)" includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any "other weapon," as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.*

4. *"Destructive device" is a type of firearm listed in 26 U.S.C. § 5845(a), and includes any explosive, incendiary, or poison gas – (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any the devices described in the preceding clauses; any type of weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or any combination of parts either designed or intended for use in converting*

any device into any destructive device listed above. For a more detailed definition, refer to 26 U.S.C. § 5845(f).

5. *"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under § 4A1.1 (Criminal History Category).*

6. *"Prohibited person," as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for more than one year," as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; or (v) being an alien, is illegally or unlawfully in the United States.*

7. *"Felony offense," as used in subsection (b)(5), means any offense punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.*

8. *Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.*

9. *For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.*

10. *Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) – (a)(5), subsection (b)(2) is not applicable.*

11. *A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and a two-level enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.*

12. *If the defendant is convicted under 18 U.S.C. § 922(i), (j), or (k), or 26 U.S.C. § 5861(g) or (h) (offenses involving stolen firearms or ammunition), and is convicted of no other offense subject to this guideline, do not apply the adjustment in subsection (b)(4) because of base offense level itself takes such conduct into account.*

13. *Under subsection (b)(6), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale*

of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

14. *Under subsection (c)(1), the offense level for the underlying offense is to be determined under § 2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).*

15. *Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

16. *An upward departure may be warranted in any of the following circumstances: (1) the number of firearms significantly exceeded fifty; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.*

17. *A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See § 4B1.4.*

18. *As used in subsections (b)(5) and (c)(1), "another felony offense" and "another offense" refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 189); November 1, 1990 (*see* Appendix C, amendment 333); November 1, 1991 (*see* Appendix C, amendment 374); November 1, 1992 (*see* Appendix C, amendment 471).

* * *

§4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17

(G) More than 1 year, but less than 5 years	12.

* If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Commentary

Application Notes:

1. *"Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in §4B1.2.*

2. *"Offense Statutory Maximum" refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.*

Background: 28 U.S.C. § 994(h) mandates that the Commission assure that certain "career" offenders, as defined in the statute, receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517.18 (statement of Senator Kennedy).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendments

47 and 48); November 1, 1989 (*see* Appendix C, amendments 266 and 267); November 1, 1992 (*see* Appendix C, amendment 459).

§4B1.2. Definitions of Terms Used in Section 4B1.1

(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –

(i) has an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that present a serious potential risk of physical injury to another.

(2) The term "controlled substance offense" means an offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one

felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

Commentary

Application Notes:

1. *The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring and attempting to commit such offenses.*

2. *"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (ie., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.*

The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an

increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

3. *"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).*

4. *The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendment 49); November 1, 1989 (*see* Appendix C, amendment 268); November 1, 1991 (*see* Appendix C, amendment 433); November 1, 1992 (*see* Appendix C, amendment 461).

* * *

§4B1.4. Armed Career Criminal

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) **33**, otherwise.*

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* If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

Commentary

Application Note:

1. *This guideline applies in the case of a defendant subject to an enhanced sentence under 18 U.S.C. § 924(e). Under 18 U.S.C. § 924(e)(1), a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another. The terms "violent felony" and "serious drug offense" are defined in 18 U.S.C. § 924(e)(2). It is to be noted that the definitions of "violent felony" and "serious drug offense" in 18 U.S.C. § 924(e)(2) are not identical to the definitions of "crime of violence" and " controlled substance offense" used in §4B1.1 (Career Offender), nor are the time periods for the counting of prior sentences under §4A1.2 (Definitions and Instructions for Computing Criminal History) applicable to the determination of whether a defendant is subject to an enhanced sentence under 18 U.S.C. § 924(e).*

   It is also to be noted that the procedural steps relative to the imposition of an enhanced sentence under 18 U.S.C. § 924(e) are not set forth by statute and may vary to some extent from jurisdiction to jurisdiction.

Background: *This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category many not adequately*

reflect the defendant's criminal history; see §4A1.3 (Adequacy of Criminal History Category).

Historical Note: Effective November 1, 1990 (*see* Appendix C, amendment 355). Amended effective November 1, 1992 (*see* Appendix C, amendment 459).

No. 91-8685

In the Supreme Court of the United States

OCTOBER TERM, 1992

TERRY LYNN STINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Court granted certiorari limited to the following question, which this Court specified:

"Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under USSG Section 4B1.1, see USSG Section 4B1.2 comment. (n.2), constitutes an 'incorrect application of the sentencing guidelines' under 18 U.S.C. Section 3742(f)(1)."

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OCTOBER TERM, 1992

No. 91-8685

TERRY LYNN STINSON, PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence, J.A. 85a-96a, is reported at 943 F.2d 1268. The opinion of the court of appeals denying the petition for rehearing, J.A. 97a-102a, is reported at 957 F.2d 813.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1991. A petition for rehearing was denied on March 20, 1992. The petition for a writ of certiorari was filed on June 18, 1992, and was granted on November 9, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

Relevant provisions of the Sentencing Reform Act of 1984 and the Sentencing Guidelines are reprinted in an appendix to this brief.

STATEMENT

1. On October 31, 1989, petitioner, an escapee from the Mississippi Department of Corrections, J.A. 28a, entered the Sun Bank of Jacksonville, Florida. He approached a customer service employee and, brandishing what appeared to be a hand grenade, said: "Give me the money or I'll throw this in your lap. Hang up the phone and give me the money now." J.A. 10a-11a. Petitioner, who was also carrying a portable radio scanner, said that he did not want any dye packs or bait money and that he wanted money from the drive-through cash drawers. Presentence Report (PSR) 2.

The customer service employee placed money in a plastic bag that petitioner had furnished, while petitioner pointed a sawed-off shotgun at her. PSR 1; J.A. 11a. Petitioner then ordered everyone in the bank to lie down. He threw the grenade, which was later found to be inert, onto the bank floor and left with a total of $9,427 in cash. J.A. 11a. Petitioner fled in a pickup truck, which the police subsequently located near petitioner's apartment. J.A. 20a. The truck contained a sawed-off section of a shotgun barrel and an explosive device. PSR 2; J.A. 20a-21a.

After abandoning the pickup truck, petitioner resumed his flight in a van, which he had stolen earlier that day by telling a salesman in a car dealership that he wanted to test drive it. During the test drive,

petitioner pulled a gun on the salesman and took him to petitioner's apartment. There, petitioner restrained the salesman with handcuffs and rope, confined him in a closet, and warned him that the apartment was rigged with a bomb that would explode if anyone opened the closet door. PSR 2; J.A. 11a.

Petitioner then drove the van to Gulfport, Mississippi, where he was arrested on November 3, 1989. J.A. 12a. The arresting officers recovered more than $6,600 of the stolen currency and the sawed-off shotgun. They also seized three inert grenades, a police radio scanner, ammunition, bomb components, full-size replicas of an M-16 rifle and a semiautomatic pistol, a stun gun, handcuffs, and knives. J.A. 12a, 52a-56a.

2. Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to a five-count indictment. The indictment charged him with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (Count 1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g) (Count 2); use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924 (c) (Count 3); possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d) (Count 4); and transportation of stolen property in interstate commerce, in violation of 18 U.S.C. 2312 (Count 5). J.A. 4a-7a, 77a.

Petitioner was sentenced in July 1990. The presentence report recommended that he be sentenced as a career offender under Sentencing Guidelines § 4B1.1 (Nov. 1, 1989). PSR 9. That Guideline provides that "[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of vio-

lence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." United States Sentencing Comm'n, *Guidelines Manual* 4.11 (Nov. 1, 1989) [hereinafter *Guidelines Manual*]. Petitioner was over 18 and had three prior convictions for crimes of violence. The presentence report used petitioner's instant conviction for being a felon in possession of a firearm as the "crime of violence" required by the second prong of the career offender definition. PSR 9.

Petitioner objected to the application of the career offender Guideline, arguing that possession of a firearm by a convicted felon is not a crime of violence and therefore cannot serve as a predicate offense for career offender sentencing. PSR Addendum 2; J.A. 34a-38a. The district court rejected that argument; it held that "the offense of possession of a firearm by a convicted felon is a crime of violence, both by its nature and how the weapon was used in this case." J.A. 44a.

Because the maximum sentence for the firearms possession offense, as enhanced by 18 U.S.C. 924(e), was life imprisonment, petitioner's base offense level under the career offender Guideline was 37. After granting him a two-level credit for acceptance of responsibility, the district court determined that petitioner's adjusted offense level was 35 and his criminal history category was VI, which yielded a Guidelines sentencing range of 292-365 months' imprisonment. J.A. 49a, 74a.[1] The court sentenced petitioner at the

[1] If the district court had used petitioner's armed bank robbery offense as the predicate offense in sentencing him under the career offender Guideline, his base offense level would have been 34, rather than 37 (since armed bank robbery carries a maximum penalty of 25 years' imprisonment, rather than life imprisonment). In that event, his Guidelines sentencing range would have been 210-262 months' imprisonment, rather than 292-365 months' imprisonment.

top of that range "due to the continuing and persistent danger that [he] continues to present to the public and a history of assaultive and violent behavior, as evidenced by the offender's past criminal record." J.A. 84a.

3. On October 4, 1991, the court of appeals affirmed petitioner's conviction and sentence. J.A. 85a. The court first noted that the district court had properly sentenced petitioner under the November 1, 1989, version of the Sentencing Guidelines, because that was the version in effect on the date of sentencing. See 18 U.S.C. 3553(a)(4) and (5). J.A. 87a, 95a.[2] The court then held that possession of a firearm by a convicted felon is "inherently" a crime of violence under Sentencing Guidelines § 4B1.2(1)(ii) (Nov. 1, 1989). J.A. 86a. That Guideline defined a "crime of violence" as one that "involves conduct that presents a serious potential risk of injury to another." The court also relied on Application Note 2 to the 1989 version of Sentencing Guidelines § 4B1.2, which explained that the term "crime of violence" includes offenses in which "the conduct set forth in the count of which the de-

[2] If the 1989 amendments had affected petitioner adversely, applying the 1989 version of the Guidelines would have raised an ex post facto issue, since four of the five charges against petitioner were based on conduct that occurred on October 31, 1989, the day before the 1989 amendments took effect. None of the pertinent 1989 changes were unfavorable to petitioner, however, so there is no ex post facto problem with following the statutory dictate that the court is to apply the Guidelines in effect at the time of sentencing.

fendant was convicted * * * by its nature, presented a serious potential risk of physical injury to another." J.A. 89a.

As of November 1, 1991, the Sentencing Commission amended the commentary to Sentencing Guidelines § 4B1.2. That amendment, designated Amendment 433, stated, *inter alia*, that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." *Guidelines Manual* App. C, amend. 433, at 694-695 (Nov. 1, 1991). Petitioner then sought rehearing in the court of appeals, contending that Amendment 433 should apply retroactively to his sentence.

The court of appeals denied rehearing. J.A. 97a. The court adhered to its original interpretation of Section 4B1.2, "that possession of a firearm by a felon inherently constitutes a 'crime of violence.'" J.A. 102a. The court observed that, before the promulgation of Amendment 433, at least four other circuits had held that a felon-in-possession offense was inherently a violent crime or could qualify as a violent crime in some circumstances, and that "no circuit court had concluded that section 4B1.2's term 'crime of violence' excluded the offense of unlawful possession of a firearm by a felon." J.A. 98a-99a. The court expressed "doubt [that] the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts." J.A. 101a. The 1991 commentary to Section 4B1.2 had "limited authority," the court concluded, since it had not "been called to Congress's attention," nor had it "been authorized by Congress." J.A. 101a. Accordingly, the court "decline[d] to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the

possession of a firearm by a felon as a 'crime of violence'" or until the Commission does so and submits the altered text for congressional review. J.A. 102a.

4. On April 30, 1992, the Sentencing Commission submitted Amendment 433 to Congress for review. 57 Fed. Reg. 20,148, 20,157 (1992). Subsequently, on September 16, 1992, the Sentencing Commission published in the *Federal Register* a notice regarding revisions to the Sentencing Guidelines. 57 Fed. Reg. 42,804. One of the revisions that the Commission made was to Sentencing Guidelines § 1B1.10(d) (Policy Statement), which lists the Guidelines that can be given retroactive effect by sentencing courts. The September 16, 1992, revision included Amendment 433 among the provisions that may be applied retroactively. The revision to Sentencing Guidelines § 1B1.10(d) (Policy Statement) took effect on November 1, 1992. 57 Fed. Reg. 42,804, 42,805.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted review of the question whether a court has incorrectly applied the Sentencing Guidelines when it fails to follow Guidelines commentary stating that unlawful possession of a firearm by a felon is not a crime of violence within the meaning of the career offender Guidelines. Analysis of that question proceeds in two steps. The first issue is whether, as a general rule, an amendment to the Sentencing Commission's Guidelines commentary is binding on the courts. The second issue is whether the court of appeals erred in not following the amendment at issue in this case. In our view, courts should generally follow the Sentencing Commission's commentary to the Guidelines, but the court of appeals did not err by refusing to do so in this case.

A. The Sentencing Guidelines are best viewed as legislative rules, which have the effect of law and thereby bind courts in the exercise of their sentencing discretion. The Sentencing Commission's commentary explains how the Guidelines should be applied and is best viewed as an agency's interpretation of its own legislative rules. Such interpretations are entitled to "controlling weight" in determining the scope and application of legislative rules, unless they are contrary to the plain text of the rules or at odds with a governing statutory or constitutional provision. Amendment 433, the 1991 commentary at issue in this case, was neither inconsistent with the text of Sentencing Guidelines § 4B1.2 nor otherwise invalid. The court of appeals was therefore incorrect in concluding that courts could disregard the commentary because it was not formally promulgated as a Guideline.

B. Although we disagree with the rationale of the court of appeals, we believe that the court was nonetheless correct to affirm the sentence in this case. The district court was correct to sentence petitioner as it did, because Amendment 433 had not been proposed or taken effect at the time of petitioner's sentencing. In fact, it did not go into effect until November 1, 1991, more than a year after petitioner was sentenced and a month after his sentence was upheld by the court of appeals.

District courts must apply the Sentencing Guidelines "in effect on the date the defendant is sentenced," 18 U.S.C. 3553(a)(4), and courts of appeals must determine whether a sentence was "imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. 3742(e)(2) and (f)(1). Those provisions make clear that a sentence

imposed in conformity with the Sentencing Guidelines in effect at the time of sentencing is not subject to reversal merely because the Sentencing Commission has subsequently amended its position.

The 1991 amendment to the commentary to Sentencing Guidelines § 4B1.2 was just one part of a comprehensive revision of the Guidelines' scheme for sentencing firearms offenders with prior convictions. In 1990 and 1991, the Sentencing Commission amended the Guidelines to establish enhanced penalties for armed career offenders and for firearms offenders with prior convictions. The change in the commentary to Section 4B1.2 had the compensating effect of ending the use of the career offender Guidelines to sentence defendants charged with felon-in-possession offenses. To give automatic retroactive effect to the change in the commentary to Sentencing Guidelines § 4B1.2 would have the effect of applying one part of the revised scheme for sentencing firearms offenders without applying any other part of that scheme, resulting in a potential windfall to defendants sentenced before November 1, 1991.

Contrary to petitioner's contention, Amendment 433 cannot be viewed as simply an explicit restatement of what was already implicit in Sentencing Guidelines § 4B1.2. Amendment 433 departed from Congress's understanding of the term "crime of violence"; it overruled a considerable body of circuit court precedent; and it was part of a dramatic change in the system for sentencing firearms offenders under the Guidelines. The court of appeals was therefore correct in declining to give Amendment 433 retroactive effect or to treat the Amendment as simply an after-the-fact confirmation of the proper con-

struction of the 1989 version of the career offender Guidelines.

C. Although the court of appeals' judgment should be affirmed, petitioner is not without recourse. While an appellate court cannot remand a case to the district court for resentencing when the Sentencing Commission amends the Guidelines, petitioner can file a motion in the district court seeking to be resentenced. Following the procedure set forth in 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10 (Policy Statement), the Sentencing Commission has recently provided that the commentary at issue in this case may be given retroactive effect. Petitioner is therefore free to move in the district court for resentencing without his felon-in-possession offense serving as the predicate offense for his career offender sentence, and the district court will have the discretion to reduce petitioner's sentence. Accordingly, the proper course for the Court in this case is to affirm the judgment below, with the understanding that petitioner may move in the district court under Sentencing Guidelines § 1B1.10 (Policy Statement) for modification of his sentence in light of Amendment 433.

ARGUMENT

THE COURT OF APPEALS PROPERLY UPHELD PETITIONER'S SENTENCE BASED ON THE DISTRICT COURT'S RULING THAT PETITIONER WAS A CAREER OFFENDER WHO HAD COMMITTED A CRIME OF VIOLENCE

A. Sentencing Courts Generally Must Follow The Sentencing Commission's Commentary On The Sentencing Guidelines

1. *The Sentencing Guidelines should be treated as the equivalent of legislative rules*

The Sentencing Guidelines are a body of law, not just a collection of suggestions about how district courts should exercise their sentencing discretion. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987, directs the Sentencing Commission to promulgate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," 28 U.S.C. 994(a)(1), and "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation," 28 U.S.C. 994(a)(2). A district court must select a sentence within the range established by the Sentencing Guidelines and Policy Statements that are in effect at the time of sentencing, see 18 U.S.C. 3553(a)(4), (a)(5), and (b); 28 U.S.C. 994(a)(2), unless the court finds an aggravating or mitigating factor of a kind or to a degree not adequately considered by the Sentencing Commission, 18 U.S.C. 3553(b); *Burns* v. *United States*, 111 S. Ct. 2182, 2184-2185 (1991). In reviewing a sentence imposed under the Guidelines, an appellate court must decide whether the sentence

"was imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. 3742(e)(2); see 18 U.S.C. 3742(f)(1). This Court has recognized that "[j]ust as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Mistretta* v. *United States*, 488 U.S. 361, 391 (1989).

Sentencing Guidelines become law after being promulgated by the Sentencing Commission through the informal rulemaking procedures in 5 U.S.C. 553, and after being submitted to Congress for a report-and-wait period of at least 180 days. 28 U.S.C. 994(p) and (x). They are therefore analogous to legislative rules adopted by federal agencies that are authorized to make law in that way. A legislative rule is the product of an exercise of delegated power to make law through rules. See *INS* v. *Chadha*, 462 U.S. 919, 953-954 n.16 (1983); compare 2 K. Davis, *Administrative Law Treatise* § 7:8, at 36 (2d ed. 1979). As this Court explained in *Batterton* v. *Francis*, 432 U.S. 416 (1977), "[l]egislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law.'" *Id.* at 425 n.9, quoting Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947); see also *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-303 (1979).

2. The Sentencing Commission's commentary on the Sentencing Guidelines should be treated as the equivalent of an agency's interpretation of its own legislative rules

Sentencing Guidelines § 1B1.7 states that the Sentencing Commission has adopted commentary accompanying the Guidelines to explain how the Guidelines should be applied. It adds that a court's failure to follow the commentary may constitute a misapplication of the Guidelines. Last Term in *Williams* v. *United States*, 112 S. Ct. 1112, 1119 (1992), this Court explained that courts must rely on the Sentencing Commission's policy statements at sentencing, since a policy statement can serve as "an authoritative guide to the meaning of the applicable guideline." Commentary can play the same role. In fact, the Sentencing Commission has stated that commentary regarding departures from the Guidelines should be "treated as the legal equivalent of a policy statement." Sentencing Guidelines § 1B1.7; *United States* v. *Guerrero*, 894 F.2d 261, 265 n.2 (7th Cir. 1990).[3]

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[3] The courts of appeals have generally accorded deference to the Commission's commentary when applying the Guidelines, although ordinarily without much analysis of the legal status of commentary. See, *e.g.*, *United States* v. *Fiore*, No. 92-1601 (1st Cir. Dec. 9, 1992), slip op. 4 (commentary is entitled to deference "unless the Commission's position is arbitrary, unreasonable, inconsistent with the guideline's text, or contrary to law"); *United States* v. *Saucedo*, 950 F.2d 1508, 1514 (10th Cir. 1991) ("we are bound by the commentary unless it cannot be reconciled with the express terms of the guideline"); *United States* v. *Anderson*, 942 F.2d 606, 612-613 (9th Cir. 1991) (en banc); *United States* v. *Smith*, 900 F.2d 1442, 1447 (10th Cir. 1990) (commentary is "essential in correctly and uniformly applying the guidelines");

If the Sentencing Guidelines are equivalent to legislative rules, the Sentencing Commission's interpretation of the Guidelines, as expressed in the Commission's commentary, are equivalent to an agency's interpretation of its legislative rules and should have the same authority that such agency interpretations are ordinarily accorded. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court set forth the classic formulation of the significance of an agency's interpretation of its own rules. As the Court explained:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Id. at 413-414. This Court has reiterated that principle on a number of occasions since then.[4]

United States v. *DeCicco*, 899 F.2d 1531, 1537 (7th Cir. 1990) ("Courts are required to consider the Commentary in interpreting and applying the Guidelines."); *United States* v. *Smeathers*, 884 F.2d 363, 364 (8th Cir. 1989) (Commission's instruction in commentary in determining how Guideline is to be applied cannot be disregarded).

[4] Accord, *e.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Northern Indiana Public Service Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); 2 K. Davis, *supra*, § 7:22, at 105-106 ("The key idea is that the administrative interpretation is controlling unless plainly erroneous or inconsistent with the regulation."); see *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986) ("an agency's construction of its own regulations is entitled to substantial deference"). Compare *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-844 (1984) (different standard applicable to an agency's interpretation of a statute).

Deference is accorded to an agency's interpretation of its own rules because agencies "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). In addition, the agency is in a better position than a reviewing court to know the reason a regulation was adopted and the intent of its authors. 2 K. Davis, *supra*, § 7:22, at 107.

The Sentencing Commission was responsible for drafting the initial set of Sentencing Guidelines and Policy Statements, 28 U.S.C. 994(a), and it has the continuing responsibility to "review and revise" the Guidelines in light of "comments and data coming to its attention" from "authorities on" and "institutional representatives of" the federal criminal justice system, 28 U.S.C. 994 (*o*); see 28 U.S.C. 994(r), (s), (u), and (w). The Commission's interpretations of the Sentencing Guidelines, expressed in commentary explaining how the Guidelines should be applied, thus reflect not only the informed judgment of the proponents of the Guidelines themselves, but also a practical understanding of the operation of the Guidelines derived from analysis of data collected from

parties who are most directly involved in their application on a day-to-day basis. See *Mistretta* v. *United States*, 488 U.S. at 369-370 ("[e]very year, with respect to each of more than 40,000 sentences * * * the Commission must review[] the presentence report, the guideline worksheets, the tribunal's sentencing statement, and any written plea agreement"); *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992). For those reasons, as long as the Sentencing Commission's commentary on a Guideline is not clearly inconsistent with the Guideline's text, and is not contrary to the Constitution or the Commission's statutory mandate, the commentary—like any other agency's interpretation of its own legislative rules—is entitled to "controlling weight." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. at 414.[5]

[5] The court of appeals in *United States* v. *Anderson*, 942 F.2d 606 (9th Cir. 1991) (en banc), employed a different analogy. The court first noted that the Sentencing Commission's commentary is entitled to greater weight than legislative committee reports, because commentary is "passed by the whole Commission," unlike legislative history materials, "which could reflect just the views of Congressional staff or of a minority of Congress." 942 F.2d at 611. The court then concluded that the Sentencing Commission's commentary should be given the same weight as the notes of the advisory committees responsible for drafting the Federal Rules of Criminal, Civil, and Appellate Procedure. *Id.* at 611-612. While that analogy is a reasonable one, we believe that the Sentencing Commission's commentary is entitled to even more weight than the advisory committees' notes, because the advisory committees are not responsible for promulgating the federal rules; this Court is. Thus, unlike the Sentencing Commission's commentary, advisory committee notes are not drafted by, and do not necessarily reflect the intent of, the authors of the relevant law.

B. The Court Of Appeals Properly Refused To Apply Amendment 433 To Petitioner's Case

Amendment 433 revised the commentary to Sentencing Guidelines § 4B1.2 by stating explicitly that the offense of possession of a firearm by a felon is not a crime of violence for purposes of the career offender Guidelines. That Amendment did not go into effect until after petitioner had been sentenced and his sentence had been affirmed by the court of appeals. Petioner brought the Amendment to the attention of the court of appeals in a rehearing petition, but the court refused to apply the Amendment in petitioner's case, since the court concluded that an amendment to commentary that has not been approved by Congress cannot nullify a decision by a court of appeals. J.A. 101a.

We agree with the result reached by the court of appeals, but we do not subscribe to the court's analysis. We agree with petitioner that the Sentencing Commission's commentary to the Sentencing Guidelines is binding on the courts unless the commentary conflicts with the text of the Guideline or is otherwise plainly erroneous. We also agree with petitioner that the Commission was not required to submit Amendment 433 to Congress before that Amendment could be accorded the full effect of an agency's interpretation of its own rules, since there is no statutory requirement that commentary be submitted to Congress before it becomes effective. Finally, the reasoning of the court of appeals—that a court need not follow an amendment to the commentary if it is inconsistent with circuit court precedent—is at odds with the principle discussed above that, "[i]n construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which be-

comes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977), quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. at 414.

One of the principal reasons that the Commission has ongoing reviewing and revising responsibility for the Sentencing Guidelines is to enable it to resolve disputes among the courts regarding interpretations of the Guidelines and to correct erroneous judicial interpretations of those Guidelines. Just as the Commission can anticipate a point of ambiguity and resolve it in advance through the commentary, it is equally legitimate for the Commission to resolve a point of dispute over the meaning of a Guideline after courts have addressed the issue. If the Commission chooses to resolve the matter by redrafting the Guideline, as it often does, the revision will be binding on the courts (in the absence of a finding that the new Guideline is unauthorized by statute or at odds with the Constitution). But there is nothing to prevent the Commission from proceeding more informally, by altering or adding to the commentary to the Guideline. In that event, the commentary will be as binding as a Guideline would be, unless the commentary is determined to be contrary to the text of the Guideline itself.

Under those principles, the Commission's commentary to Sentencing Guidelines § 4B1.2 should be respected by the courts despite prior judicial precedent construing that Guideline differently. Although the construction of Sentencing Guidelines § 4B1.2 adopted in Amendment 433 was not self-evident, the commentary does not conflict with the text of the

Guidelines, nor is it contrary to any statute or provision of the Constitution.

For the foregoing reasons, we agree that courts should sentence in accordance with Amendment 433 in all cases governed by that Amendment. It does not follow, however, that the court of appeals erred in failing to give retroactive effect to Amendment 433 in this case, since the Amendment did not become effective until more than a year after petitioner was sentenced.

As we discuss below, changes in the Sentencing Guidelines normally are not given retroactive effect, and when they are, the prescribed procedure is for the defendant to move in the district court for resentencing under the amended Guideline. In this case, we submit that the district court properly applied Sentencing Guidelines § 4B1.2 as it stood at the time of sentencing. The court of appeals was therefore correct to affirm the sentence, since a court of appeals is not authorized under the Sentencing Reform Act of 1984 to reverse a sentence that was correct when it was imposed.

1. *Appellate courts should not apply Sentencing Guidelines amendments retroactively absent express direction to the contrary in the Sentencing Guidelines*

Congress has directed sentencing courts to apply the Sentencing Guidelines "that are in effect on the date the defendant is sentenced," 18 U.S.C. 3553(a)(4), and has directed the courts of appeals to determine whether a sentence was "imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. 3742(e)(2) and (f)(1). The clear implication of those provisions is that a sentence imposed in conformity with the Sentencing Guide-

lines in effect at sentencing is not subject to reversal under 18 U.S.C. 3742(f)(1) merely because the Sentencing Commission has subsequently amended its position. See *United States* v. *Colon*, 961 F.2d 41, 45-46 (2d Cir. 1992).

That rule is sensible. A sentencing court "could not be expected to anticipate changes made after sentencing." *United States* v. *Colon*, 961 F.2d at 45. And a contrary rule would "provide offenders with a strong incentive to delay appeals, or to take unnecessary appeals, simply in the hope that some suggested change eventually finds embodiment in an amendment that takes effect before the appeal's termination." *United States* v. *Havener*, 905 F.2d 3, 7-8 (1st Cir. 1990).

The Sentencing Reform Act of 1984 and the Sentencing Guidelines specifically address the circumstances under which an amendment to the Guidelines is to be applied retroactively. Congress has imposed on the Sentencing Commission a continuing duty to revise the Guidelines, 28 U.S.C. 994(*o*), and it has also provided that "the court may reduce the term of imprisonment * * * [on the basis of such a revision] if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c)(2). It has further required the Sentencing Commission to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for [an offense for which the Guideline penalty is subsequently reduced by an amendment] may be reduced." 28 U.S.C. 994(u). In so doing, "Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton* v.

United States, 111 S. Ct. 1854, 1858 (1991). Absent an express determination by the Sentencing Commission to the contrary, Congress has "indicat[ed] that [it] did not wish appellate courts on direct review to revise a sentence in light of changes made by the Commission after the sentence has been imposed." *United States* v. *Colon*, 961 F.2d at 45-46; see *United States* v. *Havener*, 905 F.2d at 6-7.

In fulfilling its mandate to define the circumstances under which amendments to the Sentencing Guidelines should be applied retroactively, the Sentencing Commission has further limited the discretion of the courts by specifying that they may apply retroactively only those amendments specifically designated by the Commission. Sentencing Guidelines § 1B1.10(a) (Policy Statement) provides that "[w]here a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines * * *, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2)" only if the amendment is one of those specifically enumerated in subsection (d) of Section 1B1.10. Otherwise, Section 1B1.10(a) provides, "a reduction of the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement."

As petitioner notes, Br. 13, 30 n.25, on September 16, 1992, the Sentencing Commission added Amendment 433 to the list of Guidelines amendments that may be applied retroactively under 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10(d). 57 Fed. Reg. 42,805. That change was made, however, long after petitioner had been sentenced and also after his sentence had been affirmed

by the court of appeals. Because Amendment 433 was not listed in Sentencing Guidelines § 1B1.10(d) at the time the court of appeals affirmed petitioner's sentence, the court was bound by the Sentencing Commission's "authoritative guid[ance]," *Williams* v. *United States*, 112 S. Ct. at 1119, that Amendment 433 should not be given retroactive application. See Sentencing Guidelines § 1B1.10(a) (Policy Statement). Accordingly, the court of appeals did not misapply the Sentencing Guidelines by declining to apply Amendment 433 retroactively to petitioner's case.

2. The district court properly applied Sentencing Guidelines § 4B1.2 as it stood prior to Amendment 433

Because the court of appeals was correct not to apply Amendment 433 retroactively, the judgment of the court of appeals must be upheld if the court was correct in its construction of Sentencing Guidelines § 4B1.2 as it stood before the effective date of Amendment 433. We submit that the court was correct in holding that, prior to Amendment 433, possession of a firearm by a previously convicted felon was properly considered a crime of violence at least where, as in this case, the firearm was used to commit a violent crime.[6] An examination of the legislative background to the career offender Guidelines and the case law under those Guidelines provides strong support for that conclusion.

a. The statute outlawing possession of a firearm by a felon, which is now codified at 18 U.S.C. 922(g),

[6] The firearm that was the subject of the felon-in-possession charge (Count 2) was the sawed-off shotgun that petitioner pointed at the bank customer service employee during the October 31, 1989, bank robbery.

was first enacted in 1968.[7] Senator Long, the sponsor of the floor amendment that was enacted into law, described armed felons as "a hazard to law-abiding citizens." 114 Cong. Rec. 13,868 (1968). He explained that felons and other persons barred by the amendment from possessing firearms "have demonstrated that they are dangerous * * * [and] may not be trusted to possess a firearm without becoming a threat to society." *Id.* at 14,773; see *id.* at 14,774. As the Ninth Circuit put it, the felon-in-possession statute was based on "strong congressional conviction that an armed felon poses a substantial threat to all members of society." *United States* v. *O'Neal*, 910 F.2d 663, 667 (1990); see also, *e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968); *Barrett* v. *United States*, 423 U.S. 212, 220 (1976); *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974); *United States* v. *Gant*, 691 F.2d 1159, 1163 n.5 (5th Cir. 1982) (Congress sought "to prevent killings by removing firearms from persons that Congress determined would be most likely to misuse them").[8]

[7] See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 236, as amended by the Gun Control Act of 1968, Pub. L. No. 90-618, § 301, 82 Stat. 1236. In 1986, all offenses concerning the possession, receipt, sale, and transportation of firearms to prohibited persons were consolidated in 18 U.S.C. 922(g). See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(6), 100 Stat. 452 (1986).

[8] A separate prohibition against receipt of a firearm by a felon, see Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 231, was based on a congressional finding that "the ease with which any person can acquire firearms * * * (including crim-

In 1984, Congress revisited the problem of felons who possess firearms when it enacted the Armed Career Criminal Act (ACCA), Pub. L. No. 98-473, Tit. II, § 1802, 98 Stat. 2185. That Act provided an enhanced penalty for firearms possession by a felon with three previous convictions for certain offenses. In discussing the genesis of that Act, this Court observed that "throughout the history of the [ACCA], Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor* v. *United States*, 495 U.S. 575, 587-588 (1990); see also S. Rep. No. 190, 98th Cong., 1st Sess. 17 (1983) ("[T]he primary purpose of [the ACCA] is to punish third-time offenders who carry a firearm during the commission of the offense because of the danger that such persons pose to the community."). The history of Congress's regulation of firearms possession by convicted felons thus demonstrates that, in Congress's view, the felon-in-possession offense satisfied the statutory definition of a crime of violence, because it involved "a substantial risk that physical force [would be used] against the person or property of another." 18 U.S.C. 16(b).[9]

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inals * * * and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States." § 901(a)(2), 82 Stat. 225; S. Rep. No. 1097, *supra*, at 108.

[9] The statutory definition of "crime of violence" in 18 U.S.C. 16 was used as the definition of "crime of violence" in the original version of Sentencing Guidelines § 4B1.2. See *Guidelines Manual* 4.9 (Apr. 13, 1987).

Congress's concern about the threat of violence from armed felons is amply justified. Each year an estimated 639,000 Americans are victims of violent crimes committed with handguns. Bureau of Justice Statistics, *Handgun Crime Victims* 1 (1990). Thirty-five percent of all violent crimes are committed by offenders armed with guns, *id.* at 4, and many of those offenses are committed by recidivists: In the state criminal justice systems, 43 percent of felons on probation are rearrested for felonies within three years of their release, and one fifth of those arrests are for violent crimes (8.5%) or weapons offenses (1.3%). Bureau of Justice Statistics, *Recidivism of Felons on Probation, 1986-89*, at 1, 6 (1992).[10] Those figures indicate that a large number of felons commit armed, violent crimes soon after their release.

b. The courts that considered the definition of a "crime of violence" in the original version of Sentencing Guidelines § 4B1.2 (Apr. 13, 1987) uniformly

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[10] An earlier study revealed even more alarming numbers: A three-year follow-up study on state prisoners released from custody in 11 States in 1983 revealed that 62.5 percent were rearrested for felonies or serious misdemeanors. Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, at 1 (1989).

The Senate Judiciary Committee reached the following conclusion in connection with its consideration of the ACCA: "It is now well-documented that a small number of repeat offenders commit a highly disproportionate amount of the violent crime plaguing America today. Recent scholarly studies generally establish that approximately six percent of the offenders commit between 50 and 70 percent of the violent crime. The same studies indicate that true career criminals commit such offenses with extremely high frequency. For example, career robbers may engage in 40 or 50 robberies per year while career burglars often commit well over 100 offenses per year." S. Rep. No. 190, *supra*, at 5.

held that the felon-in-possession offense qualified as a crime of violence, at least in some circumstances. The Ninth Circuit concluded that possession of a firearm by a convicted felon would always be a crime of violence under the original version of Section 4B1.2, because the offense "by its nature poses a substantial risk that physical force will be used against person or property." *United States* v. *O'Neal*, 910 F.2d at 667. Other courts concluded that possession of a firearm by a felon was a crime of violence if the firearm was used in a violent crime. See, *e.g.*, *United States* v. *Alvarez*, 914 F.2d 915, 918-919 (7th Cir. 1990) (struggling with a police officer over a firearm renders felon's possession a "crime of violence"), cert. denied, 111 S. Ct. 2057 (1991); *United States* v. *Goodman*, 914 F.2d 696, 698-699 (5th Cir. 1990) (possession of a firearm by a felon, coupled with intent to fire it, constitutes a "crime of violence"); *United States* v. *McNeal*, 900 F.2d 119, 122-123 (7th Cir. 1990) (felon-in-possession offense is a "crime of violence" when there is evidence that the firearm was fired); *United States* v. *Williams*, 892 F.2d 296, 304 (3d Cir. 1989) (same), cert. denied, 496 U.S. 939 (1990); *United States* v. *Thompson*, 891 F.2d 507, 510 (4th Cir. 1989) (possession of a firearm by a felon is a "crime of violence" when the firearm is pointed at victim), cert. denied, 495 U.S. 922 (1990).

As of November 1, 1989, the Sentencing Commission altered the definition of the term "crime of violence." Instead of using the definition from 18 U.S.C. 16 that had been used in the prior version of Section 4B1.1, the Commission used as a model the slightly different language found in the definition of "violent felony" in the Armed Career Criminal Act, 18

U.S.C. 924(e)(2)(B). In its amended form, Section 4B1.2(1) provided as follows:

> The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of injury to another.

Guidelines Manual 4.12 (Nov. 1, 1989). The accompanying commentary explained that an offense other than the ones listed is considered a crime of violence when

> (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the count of which the defendant was convicted involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another.

The first courts to interpret the 1989 amendment adhered to the position that a felon-in-possession offense could qualify as a "crime of violence." The court below, for example, adopted the position earlier taken by the Ninth Circuit. It held that "the offense of weapons possession by a felon 'by its nature' imposes a 'serious potential risk of injury,'" J.A. 92a-93a, and thus "always constitutes a 'crime of violence,'" so that a felon found guilty of firearms pos-

session "is automatically subject to sentence enhancement under the career offender provisions of the Sentencing Guidelines," J.A. 94a, citing *United States* v. *O'Neal*, 910 F.2d at 667. Other courts reasoned that under the 1989 amendment, as under the prior version of Section 4B1.2, a felon's possession of a firearm could qualify as a crime of violence if the firearm were used in the commission of a violent act. See *United States* v. *Shano*, 947 F.2d 1263, 1267-1268 (5th Cir. 1991), cert. dismissed, 112 S. Ct. 1520 (1992); *United States* v. *John*, 936 F.2d 764, 767-770 (3d Cir. 1991) (felon-in-possession offense is a crime of violence if the defendant used the gun to threaten victims); *United States* v. *Cornelius*, 931 F.2d 490, 493 (8th Cir. 1991) (felon-in-possession offense is a crime of violence if the defendant entered home with a sawed-off shotgun and threatened the occupants); *United States* v. *Walker*, 930 F.2d 789, 793 (10th Cir. 1991) (felon-in-possession offense is a crime of violence if the defendant fired the weapon).

After the Sentencing Commission adopted Amendment 433, several courts took a different approach, construing the 1989 amendment to exclude felon-in-possession offenses, at least in the absence of aggravating circumstances specifically alleged in the indictment. In each of those cases, the court cited Amendment 433 as supporting the restrictive construction. See *United States* v. *Bell*, 966 F.2d 703, 706 (1st Cir. 1992); *United States* v. *Johnson*, 953 F.2d 110, 115 (4th Cir. 1991) ("the offense, felon in possession of a firearm, in the absence of any aggravating circumstances charged in the indictment, does not constitute a *per se* 'crime of violence' under the provisions of [Sentencing Guidelines] § 4B1.2"); *United States* v. *Sahakian*, 965 F.2d 740, 742 (9th Cir. 1992) (repudiating that court's earlier holding in *O'Neal* in light of the 1991 commentary amendment; felon-in-possession offense is not a "crime of violence" where the actual conduct charged in the indictment does not involve a "serious potential risk of physical injury to another"); *United States* v. *Fitzhugh*, 954 F.2d 253, 254-255 (5th Cir. 1992) ("the new commentary makes clear that only conduct charged in [the] indictment may be considered").

A survey of the case law indicates that before the Sentencing Commission set forth its view that felon-in-possession offenses could not qualify as "crimes of violence" for purposes of Sentencing Guidelines § 4B1.2, no court had adopted that position, either under the pre-1989 version of Section 4B1.2 or the post-1989 version. Accordingly, Amendment 433 effected a change in the law with regard to the interpretation of Section 4B1.2. See *United States* v. *Joshua*, 976 F.2d 844, 855 (3d Cir. 1992) (noting that "no court prior to the commentary amendment had interpreted the guideline to mean that possession of a firearm is *never* a crime of violence"); *United States* v. *Sahakian*, 965 F.2d at 742; *United States* v. *Doe*, 960 F.2d at 225 (commentary Amendment 433 is contrary to earlier holdings of several circuits); *United States* v. *Shano*, 955 F.2d 291, 295 (5th Cir.), cert. dismissed, 112 S. Ct. 1520 (1992); *United States* v. *Fitzhugh*, 954 F.2d at 255 (viewing Amendment 433 as a "shift in the law"). As the Eleventh Circuit observed, "[t]he substance of the Commission's change in the commentary runs directly counter to the substantial volume of precedent interpreting section 4B1.2." J.A. 99a.[11]

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[11] Amendment 433 overruled not only those cases holding that a felon-in-possession offense was automatically a crime of

c. To give full retroactive application to Amendment 433 by treating it as merely an explicit statement of what had always been the correct construction of Sentencing Guidelines § 4B1.2 would be erroneous for another reason: It would distort the operation of the Guidelines sentencing scheme for felon-in-possession offenses. Contemporaneously with the adoption of Amendment 433, the Sentencing Commission revised the entire approach of the Guidelines to felon-in-possession offenses committed by multiple offenders. As of November 1, 1991, the Commission amended Sentencing Guidelines § 2K2.1, which deals with firearms offenses, by indexing the defendant's base offense level to the number of his prior felony convictions. In addition, one year earlier, but still four months after petitioner was sentenced, the Commission for the first time promulgated a specific Guideline for armed career criminals, Sentencing Guidelines § 4B1.4. Thus, Amendment 433 was part of a comprehensive sentencing scheme for felon-in-possession offenders. As of November 1, 1991, those offenses no longer fell within the career offender Guideline, but they were now subject to enhanced sentences under either the amended version of Guidelines § 2K2.1 or the Sentencing Guideline covering armed career offenders, Guidelines § 4B1.4.

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violence, but also those cases holding that a court could look beyond the allegations in the indictment to determine whether, in light of the conduct underlying the possession charge, the felon-in-possession offense could be regarded as a crime of violence. The Amendment expressly limited a sentencing court's inquiry to "conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted." See, *e.g.*, *United States* v. *Joshua*, 976 F.2d at 856; *United States* v. *Fitzhugh*, 954 F.2d at 255.

To accord the benefits of Amendment 433 retroactively to a person in petitioner's position would therefore have the incongruous effect of applying only the part of the revised scheme that reduced the Guidelines sentencing range for offenders such as petitioner, while failing to apply another portion of the same scheme that effected a compensating increase in the Guidelines range for the same offenders. That kind of selective application of a part of the overall sentencing scheme could result in an unwarranted windfall for a defendant.[12] The comprehensive nature of the revision to the sentencing scheme for firearms offenders thus serves as a further indication that the change made by Amendment 433 was not intended to be automatically applied retroactively to sentences imposed before the Amendment became effective.

d. Petitioner places heavy reliance, Br. 17-19 & n.11, on the Sentencing Commission's characterization of Amendment 433 as a "clarifying" amendment. See *Guidelines Manual* App. C, at 716 (Nov. 1, 1992) ("This amendment * * * clarifies that the

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[12] Thus, absent the availability of sentencing as a career offender, a multiple offender convicted of possession of a firearm could have a base offense level as low as 12 under the 1989 version of the Guidelines. See Guidelines § 2K2.1 (Nov. 1, 1989). Under the 1991 version of the Guidelines, such an offender would have a base offense level of 24 (under Guidelines § 2K2.1 (Nov. 1, 1991)) or 33 (under Guidelines § 4B1.4 (Nov. 1, 1991)). If the amendments to Sections 2K2.1 and 4B1.4 were inapplicable to such an offender, but he was given the benefit of Amendment 433, he would avoid the level 37 sentence provided in Guidelines § 4B1.1 and would also avoid the enhanced penalties provided in the new Guidelines provisions that were designed to replace Section 4B1.1 as applied to felon-in-possession offenses.

offense of unlawful possession of a weapon is not a crime of violence for the purposes of this section."). He argues that a "clarifying" amendment must be given retroactive effect, while a "substantive" amendment must not.

Petitioner's argument is based on a false dichotomy. There is nothing in the Sentencing Guidelines to indicate that amendments denominated "clarifying" are given retroactive treatment while other amendments are not. To the contrary, as we have noted, changes to a Sentencing Guideline, to a Policy Statement, or to commentary are not retroactive under the Guidelines scheme unless they are so designated in Sentencing Guidelines § 1B1.10(d) (Policy Statement).

It is true, of course, that changes in the Sentencing Guidelines can sometimes illuminate the meaning of particular provisions by permitting the courts "to discern the Sentencing Commission's intent as to application of the pre-amendment guideline." *United States* v. *Saucedo*, 950 F.2d 1508, 1514 (10th Cir. 1991).[13] But a change in a provision of the Guidelines or commentary that dramatically alters the past construction of the provision cannot be regarded as merely illuminating and thereby entitled in effect to be given full retroactive treatment.

Amendment 433 did much more than simply make more explicit what was already apparent from a fair reading of Sentencing Guidelines § 4B1.2. Instead,

[13] See also, *e.g.*, *United States* v. *Thompson*, 944 F.2d 1331, 1347 (7th Cir. 1991), cert. denied, 112 S. Ct. 1177 (1992); *United States* v. *Restrepo*, 903 F.2d 648, 656 (9th Cir. 1990), modified on other grounds, 946 F.2d 654 (1991) (en banc), cert. denied, 112 S. Ct. 1564 (1992); *United States* v. *Aguilera-Zapata*, 901 F.2d 1209, 1213 (5th Cir. 1990); *United States* v. *Guerrero*, 863 F.2d 245, 249-250 (2d Cir. 1988).

it repudiated the congressional understanding regarding the violent nature of the felon-in-possession offense; it overruled a considerable body of circuit court precedent holding that the term "crime of violence" included at least some felon-in-possession offenses; and, most importantly, it was part of a wholesale revision in the way career offenders were sentenced under the Guidelines for firearms crimes. Since Amendment 433 was not in effect at the time of petitioner's sentencing, the court of appeals properly refused to apply the Amendment to petitioner's case. See *United States* v. *Havener*, 905 F.2d at 4 (amendment to the career offender Guideline came "too late to help the appellant, who was sentenced 6 months prior to its effective date"). The court of appeals was equally correct not to reach the same end by characterizing Amendment 433 as "merely clarifying" and treating the definition of "crime of violence" in Sentencing Guidelines § 4B1.2 as if it had excluded all felon-in-possession offenses from the outset.

C. To Take Advantage Of Amendment 433, Petitioner Must File A Motion In District Court Seeking Resentencing

The Sentencing Commission has recently decided that Amendment 433 may be given retroactive effect. 57 Fed. Reg. 42,805 (1992). It did so by including Amendment 433 among those provisions of the Guidelines listed in Sentencing Guidelines § 1B1.10(d) (Policy Statement) that can be made the subject of a request for resentencing by an already-sentenced defendant based on a subsequent change in the Guidelines reducing the applicable sentencing range. The result is that petitioner ultimately may be able to obtain relief from his sentence by moving

for resentencing under 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10(a) (Policy Statement). He cannot, however, obtain relief on direct appeal from his sentence.

The Sentencing Reform Act of 1984 requires a defendant in petitioner's position to seek relief from the district court. Under 18 U.S.C. 3582(c)(2), a defendant must file a motion in district court seeking the retroactive application of a Guidelines amendment before such an amendment can be applied in a particular case.[14] Moreover, neither 18 U.S.C. 3582(c)(2) nor Sentencing Guidelines § 1B1.10(a) (Policy Statement) *requires* a district court to reduce a defendant's sentence even when the Sentencing Commission provides that a Guidelines amendment may be applied retroactively; both the statute and the Guideline leave that determination to the district court's discretion. See 18 U.S.C. 3582(c)(2) (a court "*may* reduce the term of imprisonment") (emphasis added); Sentencing Guidelines § 1B1.10(a) (Policy Statement) ("a reduction in the defendant's term of imprisonment *may* be considered under 18 U.S.C. § 3582(c)(2)") (emphasis added). Thus, the district court may conclude that, even though one of the Guidelines used to calculate the defendant's sentence

[14] That provision is consistent with the general rule that courts of appeals are not authorized to impose sentence in a criminal case; that power rests in the district court. See 18 U.S.C. 3553, 3742(f); Fed. R. Crim. P. 32. That provision also is necessary in light of the settled rule that district courts lack inherent authority to amend a sentence once the defendant has begun to serve it; the power to revise a sentence already commenced must be granted to the court by statute. See *United States* v. *Addonizio*, 442 U.S. 178, 189 & n.16 (1979); *Affronti* v. *United States*, 350 U.S. 79, 80 (1955); *United States* v. *Murray*, 275 U.S. 347, 358 (1928).

has changed, his ultimate sentence should remain unaltered. In this case, for example, the district court could decide that even if the Amendment had been in effect when petitioner was sentenced, the court would have departed upward from the Sentencing Guidelines range, in light of petitioner's violent past as well as his violent conduct in this case. *E.g.*, J.A. 84a, quoted at page 5, *supra*; see also J.A. 5a-6a, 10a-13a, 17a-24a, 51a-56a, 59a-60a; PSR 1-3, 6-10.

For these reasons, an appellate court cannot simply vacate a defendant's sentence and remand the case to the district court for resentencing when the Sentencing Commission amends a relevant Sentencing Guideline and makes its amendment retroactive. A court of appeals must instead wait for the defendant or the district court to initiate a resentencing hearing in the district court, as contemplated by both the Sentencing Reform Act of 1984 and the Sentencing Guidelines. Accordingly, the proper course for the Court in this case is to affirm the judgment below, with the understanding that petitioner may move in district court under 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10 (Policy Statement) for modification of his sentence in light of Amendment 433.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

1. 18 U.S.C. 3553 provides, in part, as follows:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> * * * * *
>
> (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;
>
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
>
> * * * * *

2. 18 U.S.C. 3742 provides as follows:

> (a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government, with the personal approval of the Attorney General or the Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) and (b)

(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly

unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) APPLICATION TO A SENTENCE BY A MAGISTRATE.—An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

3. 18 U.S.C. 3582(c) provides as follows:

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may

not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

4. Sentencing Guidelines § 1B1.3 (Nov. 1, 1992) provides as follows:

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

5. Sentencing Guidelines § 1B1.7 (Nov. 1, 1992) provides as follows:

§ 1B1.7. Significance of Commentary

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C.

§ 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

6. Sentencing Guidelines § 1B1.10 (Policy Statement) (Nov. 1, 1992) provides as follows:

§ 1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.

(b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have originally imposed had

the guidelines, *as amended*, been in effect at that time.

(c) *Provided*, that a reduction in a defendant's term of imprisonment may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.

(d) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 379, 380, 433, and 461.

7. Sentencing Guidelines § 2K2.1 (Nov. 1, 1992) provides as follows:

§ 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) 26, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(2) 24, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or

(3) 22, if the defendant had one prior felony conviction of either a crime of violence

or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(4) 20, if the defendant—

(A) had one prior felony conviction of either a controlled substance offense; or

(B) is a prohibited person, and the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(5) 18, if the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(6) 14, if the defendant is a prohibited person; or

(7) 12, except as provided below; or

(8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), or (m).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

Number of Firearms		*Increase in Level*
(A)	3-4	add 1
(B)	5-7	add 2
(C)	8-12	add 3
(D)	13-24	add 4
(E)	25-49	add 5
(F)	50 or more	add 6.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2),

(a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

(3) If the offense involved a destructive device, increase by 2 levels.

(4) If any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels.

Provided, that the cumulative offense level determined above shall not exceed level 29.

(5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition in connection

with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r), 924(a), (b), (e), (f), (g); 26 U.S.C. § 5861(a)-(1). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

* * * * *

5. "Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2),

(a)(3), and (a)(4)(A), count any such prior conviction that receives any points under § 4A1.1 (Criminal History Category).

* * * * *

8. Sentencing Guidelines Part 4B (Nov. 1, 1989) provides, in part, as follows:

§ 4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. * * *

* * * * *

§ 4B1.2. Definitions of Terms Used In Section 4B1.1

(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

* * * * *

Commentary [as amended November 1, 1991]

Application Notes:

* * * * *

2. * * * * *

The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. When the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristic of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.

* * * * *

9. Sentencing Guidelines § 4B1.4 (Nov. 1, 1992) provides as follows:

§ 4B1.4. Armed Career Criminal

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from § 4B1.1 (Career Offender) if applicable; or

(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in § 4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) 33, otherwise.*

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or § 4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in § 4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

10. Amendment No. 374 to the Sentencing Guidelines provides as follows:

Chapter Two, Part K, Subpart 2 is amended by deleting §§ 2K2.1, 2K2.2, and 2K2.3 in their entirety as follows:

"2K2.1. *Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition*

(a) Base Offense Level (Apply the greatest):

(1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861; or

(2) 12, if the defendant is convicted under 18 U.S.C. § 922(g), (h), or (n); or if the defendant, at the time of the offense, had been convicted in any court of an offense punishable by imprisonment for a term exceeding one year; or

(3) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant obtained or possessed the firearm or ammunition, other than a firearm covered in 26 U.S.C. § 5845(a), solely for lawful sporting purposes or collection, decrease the offense level determined above to level 6.

(2) If the firearm was stolen or had an altered or obliterated serial number, increase by 2 levels.

(c) Cross References

(1) If the offense involved the distribution of a firearm or possession with intent

to distribute, apply § 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms) if the resulting offense level is greater than that determined above.

(2) If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(3), (a)(4), (a)(6), (e), (f), (g), (h), (i), (j), (k), (l), (n), and (o); 26 U.S.C. § 5861(b), (c), (d), (h), (i), (j), and (k). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. The definition of 'firearm' used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to § 1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of

an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.

2. Under § 2K2.1(b)(1), intended lawful use, as determined by the surrounding circumstances, provides a decrease in the offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history (*e.g.*, whether involving firearms), and the extent to which possession was restricted by local law.

Background: Under pre-guidelines practice, there was substantial sentencing variation for these crimes. From the Commission's investigations, it appeared that the variation was attributable primarily to the wide variety of circumstances under which these offenses occur. Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm was probably the most important factor in determining the sentence.

Statistics showed that pre-guidelines sentences averaged two to three months lower if the firearm involved was a rifle or an unaltered shotgun, This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm. Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor.

Available pre-guidelines data were not sufficient to determine the effect a stolen firearm had on the average sentence. However, reviews of pre-guidelines cases suggested that this factor tended to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes.

The firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station. In pre-guidelines practice, such prosecutions resulted in high sentences because of the true nature of the underlying conduct. The cross reference at § 2K2.1(c)(2) deals with such cases.

§ 2K2.2. *Unlawful Trafficking and Other Prohibited Transactions Involving Firearms*

(a) Base Offense Level:

(1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861;

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved distribution of a firearm, or possession with intent to distribute, and the number of firearms unlawfully distributed, or to be distributed, exceeded two, increase as follows:

Number of Firearms	*Increase in Level*
(A) 3-4	add 1
(B) 5-7	add 2
(C) 8-12	add 3
(D) 13-24	add 4
(E) 25-49	add 5
(F) 50 or more	add 6.

(2) If any of the firearms was stolen or had an altered or obliterated serial number, increase by 2 levels.

(3) If more than one of the following applies, use the greater:

(A) If the defendant is convicted under 18 U.S.C. § 922(d), increase by 6 levels; or

(B) If the defendant is convicted under 18 U.S.C. § 922(b)(1) or (b)(2), increase by 1 level.

(c) Cross Reference

(1) If the defendant, at the time of the offense, had been convicted in any court of a crime punishable by imprisonment

for a term exceeding one year, apply § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(2), (a)(5), (b), (c), (d), (e), (f), (i), (j), (k), (l), (m), (o); 26 U.S.C. § 5861(a), (e), (f), (g), (j), and (l). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. The definition of 'firearm' used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to § 1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.

2. If the number of weapons involved exceeded fifty, an upward departure may be warranted. An upward departure especially may be warranted in the case of large numbers of military type weapons (*e.g.*, machine guns, automatic weapons, assault rifles).

Background: This guideline applies to a variety of offenses involving firearms, ranging from unlawful distribution of silencers, machine guns, sawed-off shotguns and destructive devices, to essentially technical violations.

§ 2K2.3. *Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense*

(a) Base Offense Level (Apply the greatest):

(1) The offense level from § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the offense that the defendant intended or knew was to be committed with the firearm; or

(2) The offense level from § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), or § 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), as applicable; or

(3) 12.

Commentary

Statutory Provisions: 18 U.S.C. § 924(b), (f), (g).".

A replacement guideline with accompanying commentary is inserted as § 2K1.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Chapter Two, Part K, Subpart 2 is amended by deleting § 2K2.5 in its entirety as follows:

"§ 2K2.5. *Possession of Firearms and Dangerous Weapons in Federal Facilities*

(a) Base Offense Level: 6

(b) Cross Reference

(1) If the defendant possessed the firearm or other dangerous weapon with intent to use it in the commission of another offense, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 930.".

A replacement guideline with accompanying commentary is inserted as § 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone).

This amendment consolidates three firearms guidelines and revises the adjustments and offense levels

to more adequately reflect the seriousness of such conduct, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses. In addition, § 2K1.5 is amended to address offenses committed within a school zone or federal court facility. **The effective date of this amendment is November 1, 1991.**

* * * * *

11. Amendment No. 433 to the Sentencing Guidelines provides as follows:

Section 4B1.2(2) is amended by deleting "or distribution" and inserting in lieu thereof "distribution, or dispensing"; and by deleting "or distribute" and inserting in lieu thereof "distribute, or dispense".

Section 4B1.2(3) is amended by deleting "Part A of this Chapter" and inserting in lieu thereof "§ 4A1.1(a), (b), or (c)".

The Commentary to § 4B1.2 captioned "Application Notes" is amended in Note 2 by inserting "(*i.e.*, expressly charged)" immediately following "set forth"; by inserting the following at the end:

"Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving

Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.".

The Commentary to § 4B1.2 captioned "Application Notes" is amended in Note 2 by inserting "(including any explosive material or destructive device)" immediately following "explosives".

The Commentary to § 4B1.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentences at the end:

"A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

This amendment clarifies that the application of § 4B1.2 is determined by the offense of conviction (*i.e.*, the conduct charged in the count of which the defendant was convicted); clarifies that the offense of unlawful possession of a weapon is not a crime of violence for the purposes of this section; clarifies the definition of a prior adult conviction; makes the definitions in § 4B1.2

(2) more comprehensive; and clarifies the application of § 4B1.2(3) by specifying the particular provisions of Chapter Four, Part A to which this subsection refers. **The effective date of this amendment is November 1, 1991.**

* * * * *

12. Amendment No. 461 to the Sentencing Guidelines provides as follows:

Section 4B1.2(3) is amended by deleting the last sentence as follows:

"The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.",

and inserting in lieu thereof:

"The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.".

The Commentary to § 4B1.2 captioned "Application Notes" is amended by deleting the text of Note 2 as follows:

" 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (*i.e.*, expressly charged)

in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictionsm for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.",

and inserting in lieu thereof:

" 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person

of another, or (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device), or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.".

This amendment conforms the definition of "sustaining a conviction" in § 4B1.2 to the definition of "convicted of an offense" in § 4A1.2. In addition, this amendment ratifies a previous amendment to the commentary to § 4B1.2 (amendment 433, effective November 1, 1991) and corrects a clerical error in a reference in that commentary to § 2K2.1. The previous amendment to the text of Application Note 2 clarified that application of § 4B1.2 is governed

by the offense of conviction, and that the offense of being a felon in possession of a firearm is not a crime of violence within the meaning of this guideline. As a clarifying and conforming change, the previous commentary amendment reflected Commission intent that the term "crime of violence," as that term is used in §§ 4B1.1 and 4B1.2, be interpreted consistently with that term as used in other provisions of the Guidelines Manual. For example, § 4B1.4, as promulgated by amendment 355, effective November 1, 1990, provides an increased offense level for a "felon-in-possession" defendant who is subject to an enhanced sentence under 18 U.S.C. § 924(e) and who used or possessed the firearm in connection with a crime of violence (§ 4B1.4(b)(3)(A)). This action to ratify a previous commentary amendment was taken because of concerns raised by *United States* v. *Stinson*, 957 F.2d 813 (11th Cir. 1992), in which the court stated it would not follow amendment 433 because the commentary amendment was not submitted to Congress. **The effective date of this amendment is November 1, 1992.**

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Case No. 91-8685

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

TERRY LYNN STINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF

OF THE

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

IN SUPPORT OF PETITIONER

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A. QUESTION(S) PRESENTED

What legal weight should be given by the Courts of the United States to the policy statements and commentary to the United States Sentencing Guidelines?

B. PARTIES TO THE PROCEEDINGS[1]

The identities of the parties are stated in the style of the case.

[1]The Florida Association of Criminal Defense Lawyers is a statewide organization with over one thousand members. The FACDL has a standing Amicus Curiae and Lawyer Support Committee of which the undersigned is chairman. The Petitioner and counsel of record for Petitioner have personally requested the participation of the FACDL in this case, and the Board of Directors has specifically approved the representation. The case otherwise meets internal criteria for FACDL participation. Opposing counsel has been consulted and does not oppose the appearance of amicus.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

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c. Other

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United States v. Stinson, 943 F.2d 1268, *rehearing denied*, 957 F.2d 813 (11th Cir. 1992).

E. STATEMENT OF JURISDICTION

1. Citation to Statutory Provision

Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1).

2. Time Factors

The judgment of the Court of Appeals became final on denial of rehearing on 20 March 1992. The Petition for Writ of Certiorari was timely filed by Petitioner on 18 June 1992.

F. CONSTITUTIONAL OR STATUTORY PROVISIONS

18 U.S.C. § 3553(a)(5)

any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced.

18 U.S.C. § 3553(b)

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. *In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.* In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by

guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

G. STATEMENT OF THE CASE

Amicus curiae accepts the Statement of the Case advanced by counsel of record for the Petitioner.

H. SUMMARY OF THE ARGUMENT

In *Williams v. United States*, --- U.S. ---, 112 S. Ct. 1112, 1118 (1992), the majority noted that the dissent would draw a distinction between the "actual" guidelines and the policy statements that "interpret[]" and "explain[]" them. While the majority never actually said exactly what the policy statements were, they noted that policy statements were distinct from the guidelines, but that the guidelines were not unaffected by the policy statements. It is, respectfully, the position of amicus that the distinction between the Guidelines and the policy statements is one without a difference. As

noted by the majority in *Williams* where an error in interpreting a policy statement leads to an incorrect determination of the appropriate sentence, the resulting sentence is one which was "imposed as a result of an incorrect application of the Sentencing Guidelines" within the meaning of 18 U.S.C. § 3742(f)(1).

I. ARGUMENT

Misapplication of a Directive Policy Statement of the United States Sentencing Guidelines Will Result in an Incorrect Application of the Sentencing Guidelines Within the Meaning of 18 U.S.C. § 3742(f)(1).

Congress has made it clear that sentencing guidelines policy statements are to be taken seriously. The statutes defining the Sentencing Guidelines Commission's duties authorize it to promulgate guidelines and general policy statements. 28 U.S.C. § 994(a)(1), (2) and (3) (1988). 18 U.S.C. § 3553 (1988) requires in a number of passages that the sentencing court consider the policy statements in imposing a sentence. The court shall consider both "the kinds of sentence and the sentencing range" set forth in the guidelines, 18 U.S.C. § 3553(a)(4) (1988), and "any pertinent policy statement issued by the Sentencing Commission...." 18 U.S.C. § 3553(a)(5). The same statute provides that a sentence shall be imposed under the

guidelines unless the sentencing court finds that an aggravating or mitigating circumstance has not been adequately taken into consideration by the Commission in formulating the guidelines, and in so determining "the court shall consider only the sentencing guidelines, *policy statements, and official commentary of the Sentencing Commission*" 18 U.S.C. § 3553(b) (emphasis added). In the absence of applicable guidelines the court shall consider the relationship of the sentence to guidelines sentences applicable to similar offenses and offenders "and to the applicable policy statements of the Sentencing Commission." 18 U.S.C. § 3553(b). *United States v. Kelly*, 956 F.2d 748, 753 (8th Cir. 1992).

Specific statutes require consideration of the guidelines. 18 U.S.C. § 3582(a) (1988) requires that the court "shall consider any pertinent policy statements" in determining whether to recommend an appropriate type of prison facility. The court may modify a term of

imprisonment upon motion by the Director of the Bureau of Prisons after considering the factors set forth in section 3553(a) (which includes policy statements) if it finds extraordinary and compelling reasons warrant a reduction and that such reduction is "consistent with applicable policy statements" of the Commission. 18 U.S.C. § 3582(c)(1)(A) (1988). If a sentencing range has been lowered by the Commission, the district court may reduce the term "if such reduction is consistent with applicable policy statements." 18 U.S.C. § 3582(c)(2) (1988). Further, the court may order conditions of supervised release "consistent with any pertinent policy statements" issued by the Commission. 18 U.S.C. § 3583(d)(3) (1988). *United States v. Kelly*, *supra*, 956 F.2d, at 753.

The cited statutes, with their frequent use of mandatory language, all evidence congressional intent that policy statements be considered and that the courts' actions be consistent with policy statements. While there is the

statutory requirement that amendments to the guidelines, but not to the policy statements, be submitted to Congress as part of the amendment process, *see* 28 U.S.C. § 994(p) (1988), *United States v. Stinson*, 957 F.2d 813, 815 (11th Cir. 1992), the Eighth Circuit does not believe that this provision undermines the authority elsewhere given to the policy statements. *United States v. Kelly*, *supra*, 956 F.2d, at 753.

In a discussion concerning 18 U.S.C. § 3742, which provides for appeal in the event a sentence is imposed "as a result of an incorrect application of the sentencing guidelines," S.Rep. No. 225, 98th Cong., 2d Sess. 167-68 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3350-51 (footnotes omitted), states:

> It should be noted that a sentence that is inconsistent with the sentencing guidelines is subject to appellate review, while one that is consistent with guidelines but inconsistent with the policy statements is not. This is not intended to undermine the value of the policy statements. It is, instead, a recognition that the policy statements may be more general in nature than the guidelines and thus more

> difficult to use in determining the right to appellate review. Nevertheless, the *sentencing judge is required to take the policy statements into account in deciding what sentence to impose and it is expected that the policy statements will be consulted at all stages of the criminal justice system, including the appellate courts*, in evaluating the appropriateness of the sentence and corrections program applied to a particular case. (emphasis added).

The excerpt confirms the idea that the distinction between policy statements and guidelines is a meaningful one. The statement indicates that it is the relative specificity and generality of the provisions that distinguishes material to be included in a policy statement from that to be included in guidelines. The Senate Report referring to policy statements is language of guidance, not of command, because the policy statements are not a code and are not meant to be applied as a code. But Congress' use of the word "consider" does not mean that the courts can reject the policy statements as they please, but shows that Congress anticipated that the more general material to be included in a policy statement would

frequently be of a nature to illuminate, though not necessarily determine, the proper outcome. *United States v. Kelly, supra*, 956 F.2d, at 754.

Other circuits have commented that the U.S.S.G.'s policy statements do not carry the same imperative as the guidelines themselves. *See, e.g., United States v. Blackstone*, 940 F.2d 877, 893 (3d Cir.) ("Chapter 7 policy statements are not 'guidelines.' Whereas guidelines are binding on the courts, policy statements are merely advisory."), *cert. denied*, --- U.S. ---, 112 S. Ct. 611, 116 L. Ed.2d 634 (1991); *United States v. Pharr*, 916 F.2d 129, 133 n.6 (3d Cir. 1990) ("We recognize that policy statements are not binding in the same way as the actual guidelines."), *cert. denied*, --- U.S. ---, 111 S. Ct. 2274, 114 L. Ed. 2d 725 (1991); *see also United States v. Oliver*, 931 F.2d 463, 465 (8th Cir. 1991) (noting, "there are no binding guidelines addressing the sentence for a violation of a condition of supervised release, only a policy statement about a court's

options in such a situation"); *United States v. Ayers*, 946 F.2d 1127, 1130 (5th Cir. 1991) (implying that policy statements are not binding).

Subsections of 18 U.S.C. § 3553 and of 18 U.S.C. § 3583 confirm that policy statements are to be treated differently than guidelines. *Compare* 18 U.S.C. § 3553(b), entitled "Application of guidelines in imposing a sentence" (The court *shall impose* a sentence of the kind, and within the range referred to ...") (emphasis added), *with* 18 U.S.C. § 3553(a)(5), entitled "Factors *to be considered* in imposing a sentence" ("any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2) that is in effect on the date the defendant is sentenced") (emphasis added). In § 3583(e), Congress specifically recited that "[t]he court may, after *considering* the factors set forth in section ... [3553](a)(5)," terminate, extend, revoke, or modify a term of supervised release pursuant to the terms of this section. (emphasis added). But a discussion of the

question of whether the policy statements are "advisory rather than mandatory" is an unnecessary legal exercise. *Cf. United States v. Lee*, 957 F.2d 770 (10th Cir. 1992) (holding the policy statements regarding revocation of supervised release contained in Chapter 7 of the U.S.S.G. are advisory rather than mandatory.

While the guidelines are distinct from policy statements that is not to say that the meaning of the guidelines is unaffected by policy statements. *Williams v. United States*, --- U.S. ---, 112 S. Ct. 1112, 1119 (1992). Where a policy statement clarifies and gives affirmative direction to the application of a specific guideline, the statement is an authoritative guide to the meaning of the applicable guideline. An error in interpreting such a policy statement may lead to an incorrect determination that a departure was appropriate. In that event, the resulting sentence would be one that was "imposed as a result of an incorrect application of the sentencing guidelines" within the

meaning of § 3742(f)(1). Similarly, an erroneous calculation under the Sentencing Table, from which all Guidelines sentencing ranges are derived, could properly be reviewed as an "incorrect application of the sentencing guidelines" under § 3742(f)(1) even though the Table itself is not officially designated as a "guideline." *See* U.S.S.G., ch. 5, part A.

As the Eleventh Circuit noted, *United States v. Stinson*, 957 F.2d 813, 814 (11th Cir. 1992), below:

> The commission's amendment did not alter the actual text of § 4B1.2 [of the Sentencing Guidelines]; instead, it merely changed the commentary.

The text of § 4B1.2 U.S.S.G. was exactly the same in October 1989, when Petitioner Stinson committed his offense, as when reviewed on appeal. The Eleventh Circuit thought it "crucial to examine closely the appropriate weight to be afforded the commentary." *Id.* To take such an approach, however, runs afoul of the majority's position in *Williams v. United States*, --- U.S. ---, 112 S. Ct. 1119

(1992). While guidelines are distinct from policy statements, when the guidelines do not change, as below, but the policy statement does change, an obvious and different interpretation of the existing guideline must be in order. While the Eleventh Circuit may refuse to be bound by changes in the commentary until Congress amends the guidelines to exclude specifically the possession of a firearm by a felon, *United States v. Stinson*, 957 F.2d, at 815, the Eleventh Circuit is still under the mandate of the guideline which has not changed and which has been approved by Congress. The only change has been a commentary or explanation of the *correct* application of the Sentencing Guideline. In this case, the correct interpretation of the Guideline runs afoul of precedent of the Eleventh Circuit (and other circuits). *See United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1991); *United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1990); *see also United States v. Alvarez*, 914 F.2d 915 (7th Cir. 1990) (applying a "facts of the case" analysis for whether or not possession of

a firearm by a felon is a crime of violence); *United States v. Goodman*, 914 F.2d 696 (5th Cir. 1990) (same); *United States v. Williams*, 892 F.2d 296 (3rd Cir. 1989) (same). The legislative history expects that policy statements will be consulted at all stages of the criminal justice system, including the appellate courts, in evaluating the appropriateness of a sentence or corrections program applied to a particular case. The Eleventh Circuit by its position would opt out until Congress passes on the amendment or until the commission changes the text of the Guidelines. *United States v. Stinson*, *supra*, 957 F.2d, at 815 n.4. This holding is in effect saying that the meaning of the Guidelines is "unaffected by policy statements" and therefore does not follow *Williams*. In refusing to acknowledge the policy statement which clarifies an existing and adopted Guideline, the Eleventh Circuit has, in effect, approved a sentence which was imposed as a result of an incorrect application of the Sentencing Guidelines.

J. CONCLUSION

Policy statements issued by the Sentencing Commission do not fit neatly into any of the usual categories of legal authority. On the one hand, they warrant greater attention than does ordinary legislative history, because Congress specifically directed sentencing courts to consider the policy statements. By statutory mandate, "[t]he court, in determining the particular sentence to be imposed, shall consider ... any pertinent policy statement issued by the Sentencing Commission." 18 U.S.C. § 3553(a) (1988). Policy statements are approved by the Sentencing Commission as a whole, and Congress had the policy statements before it when it approved the Guidelines and amendments thereto. *See* United States Sentencing Commission, Sentencing Guidelines and Policy Statements (April 13, 1987); United States Sentencing Commission, 1990 Annual Report 1, 23.

On the other hand, as many courts have noted, policy

statements cannot be viewed as equivalent to the Guidelines themselves. *See*, *e.g.*, *United States v. Lee*, 957 F.2d 770, 772-73 (10th Cir. 1992) (policy statements are "advisory"); *United States v. Blackstone*, 940 F.2d 877, 893 (3rd Cir.) ("Whereas guidelines are binding on the courts, policy statements are merely advisory."), *cert. denied*, --- U.S. ---, 112 S. Ct. 611, 116 L. Ed. 2d 634 (1991). *Cf. United States v. Anderson*, 942 F.2d 606, 609-14 (9th Cir. 1991) (en banc) (Sentencing Commission's commentary must be treated as something more than legislative history but less than Guidelines).

Congress was careful to distinguish Guidelines from policy statements. *Compare* 28 U.S.C. § 994(a)(1) (1988) (Guidelines are "for use of a sentencing court in determining the sentence to be imposed in a criminal case.") *with* 28 U.S.C. § 994(a)(2) (1988) (Policy statements are instructions "regarding application of the guidelines or any other aspect of sentencing or sentence implementation."). As one judge

explained, Congress must have envisioned a difference between guidelines and policy statements or it would not have made the distinction." *United States v. Gutierrez*, 908 F.2d 349, 353 (Heaney, J., dissenting), *vacated by an equally divided court*, 917 F.2d 349 (8th Cir. 1990) (en banc). Only the Guidelines themselves need be submitted to Congress for approval, not the Commission's policy statements. 28 U.S.C. § 994(p) (1988). When the Commission submitted its initial Sentencing Guidelines to Congress in 1987, it submitted policy statements as well. *See* United States Sentencing Commission, Sentencing Guidelines and Policy Statements 5.26 (April 13, 1987). Nevertheless, the statute required only the Guidelines to be submitted, and the Second Circuit considered that distinction significant as an indication of the relative weight Congress would have the courts accord Guidelines and policy statements. *United States v. Johnson*, 964 F.2d 124 (2nd Cir. 1992).

While the legislative history clearly shows that a

sentence inconsistent with the Sentencing Guideline is subject to appellate review while one that is inconsistent with the policy statements is not, the analysis does not end. If the sentence on review is inconsistent with the specific directives of a policy statement, it is manifest that the sentencing court imposed a sentence as a result of an incorrect application of the Guidelines. Where, as here, the policy statement explicitly states what offense conduct should, or should not, be included in the Sentencing Guideline to be applied, and the sentencing court completely ignores the policy statement, an error in interpreting the policy has resulted. The error in interpreting the policy statement leads to the imposition of a sentence as a result of an incorrect application of the Sentencing Guideline. *See Williams v. United States*, --- U.S. ---, 112 S. Ct. 1118 (1992).

K. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Paul Larken
Assistant Deputy
Office of the Solicitor General
Tenth and Constitution Avenue
Washington, D.C. 20530

by ~~hand~~/mail delivery this 16th day of January, 1993.

Respectfully submitted,

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